Edict of Government

"Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties."

Chief Justice Roberts
Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.
590 U.S. ___ ,140 S. Ct. 1498, 206 L. Ed. 2d 732

VIRGINIA MODEL JURY INSTRUCTIONS

Criminal

2021-2022 Edition

Virginia Model Jury Instructions Committee
Appointed by the Chief Justice

PUBLICATION UPDATE

Route to: ☐ ____ ☐ ____ ☐ ____ ☐ ____
☐ ____ ☐ ____ ☐ ____ ☐ ____

Virginia Model Jury Instructions—Criminal

Publication 67988 Release 22 October 2021

HIGHLIGHTS

2021 Updates

- The 2021-2022 Annual Edition includes the 2021 updates of *Virginia Model Jury Instructions — Criminal.* Updated and revised to incorporate important developments during the past year, the *Virginia Model Jury Instructions — Criminal* provide comprehensive, authoritative coverage of Virginia criminal law. Over 45 new instructions have been added, over 25 instructions have been withdrawn, nine instructions have been re-numbered, and numerous other instructions have been revised, along with accompanying Sources & Authority.
- Release 22 includes **Virginia Model Jury Instructions — Criminal** on E-file. The companion Jury Instructions on E-file facilitates quick, efficient drafting and preparation of jury communication language.

NEW INSTRUCTIONS

- Instruction No. P22.500(c) Schedule III Controlled Substance—Possession
- Instruction No. 22.520(a) Marijuana—Possession; Presumption of Personal Use
- Instruction No. 22.521 Marijuana or Marijuana Products—Possession
- Instruction No. P22.521 Marijuana or Marijuana Products—Possession
- Instruction No. 22.522(a) Marijuana Plants for Personal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants
- Instruction No. P22.522(a) Marijuana Plants for Per-

sonal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants

- Instruction No. 22.522(b) Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants
- Instruction No. P22.522(b) Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants
- Instruction No. 22.522(c) Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants
- Instruction No. P22.522(c) Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants
- Instruction No. 22.523 Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations
- Instruction No. P22.523(a) Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations
- Instruction No. P22.523(b) Marijuana Plants for Personal Use—Home Cultivation—Second Offense
- Instruction No. 22.524 Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities
- Instruction No. P22.524 Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities
- Instruction No. 22.525 Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities
- Instruction No. P22.525 Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities
- Instruction No. 22.526 Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway
- Instruction No. 22.P526 Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway
- Instruction No. 22.527 Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus
- Instruction No. P22.527 Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus
- Instruction No. 22.528 Carrying Marijuana or Marijuana Products in Motor Vehicle Used or Licensed to

Transport Passengers for Hire

- Instruction No. P22.528 Carrying Marijuana or Marijuana Products in Motor Vehicle Used or Licensed to Transport Passengers for Hire
- Instruction No. 24.700 Threats to Intimidate the Population at Large
- Instruction No. P24.700 Threats to Intimidate the Population at large
- Instruction No: 26.260 Defrauding Hotels, Restaurants, Etc.
- Instruction No. P26.260 Defrauding Hotels, Restaurants, Etc.
- Instruction No. 26.270 Fraudulent Conversion or Removal of Leased Personal Property
- Instruction No. P26.270 Fraudulent Conversion or Removal of Leased Personal Property
- Instruction No. 26.280 Evidence of Intent to Defraud
- Instruction No. 47.100(a) Robbery that Caused Serious Bodily Injury to, or the Death of, any Other Person
- Instruction No. 47.100(b) Robbery Committed by Using or Displaying a Firearm in a Threatening manner
- Instruction No. P47.100(b) Robbery Committed by Using or Displaying a Firearm in a Threatening Manner (for robberies committed after July 1, 2021)
- Instruction No. 47.100(c) Robbery Using Physical Force not Resulting in Serious Bodily Injury, or Robbery by Using or Displaying a Deadly Weapon Other than a Firearm in a Threatening Manner
- Instruction No. P47.100(c) Robbery—Punishment for a Robbery by Using Physical Force and Which Did Not Result in Serious Bodily Injury (for robberies committed after July 1, 2021)
- Instruction No. 47.100(d) Simple Robbery—Robbery Using Threats or Intimidation or Robbery by any Other Means not Involving a Deadly Weapon
- Instruction No. P47.100(d) Robbery—Punishment for a Simple Robbery—Committed by Using Threats or Intimidation or Robbery by Any Other Means not Involving a Deadly Weapon (for robberies committed after July 1, 2021)
- Instruction No. 47.150 Definition of "Serious Bodily Injury"
- Instruction No. 47.160 Definition of a "firearm"
- Instruction No. 47.170 Definition of a "Deadly Weapon"
- Instruction No. 48.600(d) Sexual Battery—Aggravated (Massage Therapist/Purporting to be Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing

Arts; Physical Therapist/Purporting to be a Physical Therapist)

- Instruction No. P48.600(d) Sexual Battery—Aggravated (Massage Therapist/Purporting to be Massage Therapist)
- Instruction No. 48.610 Massage Therapist—Defined
- Instruction No. 48.615 Practice of Massage Therapy—Defined
- Instruction No, 48.620 Person Practicing or Purporting to Practice the Healing Arts—Defined
- Instruction No, 48.625 Healing Arts—Defined
- Instruction No, 48.630 Physical Therapist—Defined
- Instruction No, 48.635 Practice of Physical Therapy—Defined
- Instruction No. 53.170 Mental Illness Without Insanity Defense
- Instruction No. 53.185 Expert Witnesses—Mental Illness Without Insanity Defense
- Instruction No. 54.100 Class 1 Felony

WITHDRAWN INSTRUCTIONS

- Instruction No. 2.600 Inference of Intention
- Instruction No. 22.160 Synthetic Cannabinoids—Manufacturing, Possession With Intent to Manufacture
- Instruction No. P22.160(a) Synthetic Cannabinoids—Manufacturing, Possession With Intent to Manufacture
- Instruction No. P22.160(b) Synthetic Cannabinoids—Possession Only
- Instruction No. 22.230 Synthetic Cannabinoids—Selling, Giving, or Distributing: No Evidence of Accommodation
- Instruction No. P22.230 Synthetic Cannabinoids—Selling, Giving, or Distributing: No Evidence of Accommodation
- Instruction No. 22.265 Synthetic Cannabinoids—Selling, Giving, or Distributing: Evidence of Accommodation
- Instruction No. P22.265 Synthetic Cannabinoids—Selling, Giving, or Distributing: Evidence of Accommodation
- Instruction No. 22.325 Synthetic Cannabinoids—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation
- Instruction No. P22.325 Synthetic Cannabinoids—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation
- Instruction No. 22.380 Synthetic Cannabinoids—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation
- Instruction No. P22.380 Synthetic Cannabinoids—

Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

- Instruction No. 22.560 Synthetic Cannabinoids—Possession
- Instruction No. P33.120 Capital Murder—Bifurcated Penalty Trial—Intellectual Disability
- Instruction No. P33.121 Intellectual Disability—Definition
- Instruction No. P33.122 Capital Murder—Bifurcated Penalty Trial—Two Aggravators
- Instruction No. P33.125 Capital Murder—Bifurcated Penalty Trial—One Aggravator
- Instruction No. P33.127 Capital Murder—Bifurcated Penalty Trial—Mitigation
- Instruction No. P33.130(a) Capital Murder—Verdict Form
- Instruction No. P33.130(b) Capital Murder—Verdict Form
- Instruction No. P33.130(c) Capital Murder—Verdict Form
- Instruction No. P33.130(d) Capital Murder—Verdict Form
- Instruction No. P33.130(e) Capital Murder—Verdict Form
- Instruction No. P33.130(f) Capital Murder—Verdict Form
- Instruction No. P33.130(g) Capital Murder—Verdict Form
- Instruction No. P33.130(h) Capital Murder—Verdict Form
- Instruction No. P33.130(i) Capital Murder—Verdict Form

RE-NUMBERED INSTRUCTIONS

- Instruction No. 48.620 renumbered as new Instruction No. 48.640 Sexual Battery
- Instruction No. P48.620 renumbered as new Instruction No. P48.640 Sexual Battery
- Instruction No. 48.640 renumbered as new Instruction No. 48.650 Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender
- Instruction No. P48.640 renumbered as new Instruction No. P48.650 Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender
- Instruction No. 48.650 renumbered as new Instruction No. 48.660 Sexual Abuse—Definition
- Instruction No. 48.660 renumbered as new Instruction No. 48.670 Intimate Parts—Definition
- Instruction No. 48.670 renumbered as new Instruction No. 48.680 Threat of Force—Definition
- Instruction No. 48.675 renumbered as new Instruction No. 48.685

Intimidation—Definition

- Instruction No. 48.680 renumbered as new Instruction No. 48.690 Consent

REVISED INSTRUCTIONS

- Instruction No. 2.250 Where Previous Conviction of the Same or Similar Crime Is an Element of Offense
- Instruction No. 3.300 Accessory After the Fact
- Instruction No. P3.300(a) Accessory After the Fact—Homicide Punishable as a Class 1 or 2 Felony
- Instruction No. 4.100 Abduction—General
- Instruction No. 4.300 Abduction—By Parent Within the Commonwealth
- Instruction No. 6.100 Manufacturing or Bottling Without License
- Instruction No. 6.150 Manufacturing While Armed
- Instruction No. 6.200 Illegal Sale—General
- Instruction No. 6.250 Illegal Sale—To Persons Not Permitted to Buy
- Instruction No. 6.300 Illegal Purchase—General
- Instruction No. 6.350 Illegal Purchase or Possession—By Persons Not Permitted to Purchase or Possess
- Instruction No. 6.400 Maintaining Common Nuisance—Manufacture, Storage, Sale, Dispensing, Giving Away, or Use of Alcoholic Beverages
- Instruction No. 7.250 Burning Structure or Building Other Than Dwelling—Unoccupied
- Instruction No. 7.300 Burning Realty With Malice or Intent to Defraud—Person Therein
- Instruction No. 7.350 Burning Realty With Malice or Intent to Defraud—No Person Therein
- Instruction No. 7.400 Burning Personal Property
- Instruction No. 7.500 Burning Building or Structure While Unlawfully Therein With Intent to Commit Felony
- Instruction No. 7.600 Threatening to Bomb or Damage Buildings, etc.
- Instruction No. 7.650 Communicating False Information
- Instruction No. 7.700 Possession of Fire Bomb Material
- Instruction No. 7.750 Manufacturing, Transporting, Distributing, Possessing, or Using Fire Bomb or Explosive Material or Device
- Instruction No. 8.100 Attempt—General Elements
- Instruction No. 8.500 Solicitation
- Instruction No. 9.100 Issuing Bad Check (Felony)
- Instruction No. 9.150 Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)
- Instruction No. 9.200 Issuing Bad Check (Misdemeanor)

- Instruction No. 9.350 Inference of Intent—No Account
- Instruction No. 10.100 Use of Profane, Threatening, or Indecent Language Over Telephone, Etc.
- Instruction No. 10.200 Burning of Object With Intent to Intimidate—Private Property
- Instruction No. 10.220 Burning of Object With Intent to Intimidate—Highway or Public Place
- Instruction No. 10.300 Placing a Swastika With Intent to Intimidate
- Instruction No. P10.300 Placing a Swastika With Intent to Intimidate
- Instruction No. 10.400(a) Unlawful Paramilitary Activity—Training, Teaching, or Demonstrating
- Instruction No. 10.400(b) Unlawful Paramilitary Activity—Assembling for Training, Practice, or Instruction
- Instruction No. 10.400(c) Unlawful Paramilitary Activity—Brandishing Firearm While Assembled to Intimidate
- Instruction No. 10.500 Causing Telephone or Pager to Ring with Intent to Annoy—Emergency
- Instruction No. P10.500 Causing Telephone or Pager to Ring with Intent to Annoy—Emergency
- Instruction No. 11.100 Offer of Pecuniary Benefit to Public Servant or Party Official
- Instruction No. 11.150 Offer of Benefit to Public Servant or Party Official: Judicial or Administrative Proceeding
- Instruction No. 11.200 Acceptance of Pecuniary Benefit by Public Servant or Party Official
- Instruction No. 11.250 Acceptance of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding
- Instruction No. 11.300 Solicitation of Pecuniary Benefit by Public Servant or Party Official
- Instruction No. 11.350 Solicitation of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding
- Instruction No. 12.100 Common Law Burglary—Unarmed
- Instruction No. 12.150 Common Law Burglary—Armed
- Instruction No. 12.200 Statutory Burglary—With Intent to Commit Murder, Rape, Robbery, or Arson
- Instruction No. 12.220 Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson
- Instruction No. 12.230 Statutory Burglary—With Intent to Commit Assault and Battery
- Instruction No. 12.240 Statutory Burglary—Breaking and Entering Dwelling House With Intent

to Commit Misdemeanor Other Than Trespass or Assault and Battery

- Instruction No. 12.300 Entering Bank While Armed With a Deadly Weapon With Intent to Commit Larceny
- Instruction No. 12.400 Possession of Burglary Tools
- Instruction No. 13.100 Computer Fraud—General
- Instruction No. 13.300 Computer Trespass and Lesser Included Offenses
- Instruction No. 13.310 Computer Trespass—Recording Keystrokes (Felony)
- Instruction No. 13.320 Computer Trespass—Recording Keystrokes
- Instruction No. 13.330 Computer Trespass—Installing Software (Felony)
- Instruction No. 13.340 Computer Trespass—Installing Software on Five or More Computers
- Instruction No. 13.400 Computer Invasion of Privacy
- Instruction No. 13.500 Harassment by Computer
- Instruction No. 13.600 Fraud by Electronic Communication
- Instruction No. 13.700 Theft of Computer Services
- Instruction No. 14.100 Conspiracy—General
- Instruction No. 14.500 Conspiracy to Rig a Government Bid
- Instruction No. 16.100 Credit Card Theft—General
- Instruction No. 16.200 Credit Card Forgery
- Instruction No. 16.300 Credit Card Fraud—Intent to Use, Sell or Transfer
- Instruction No. 16.305 Credit Card Fraud—Expired or Revoked Card or Number
- Instruction No. 16.310 Credit Card Fraud—False Representation
- Instruction No. 16.320 Credit Card Fraud—Obtaining Cash Advance
- Instruction No. 17.100 Damage to Realty or Personalty (Felony)
- Instruction No. 18.100 Discharging Firearms Within Occupied Building
- Instruction No. 18.200 Shooting/Throwing at Occupied Building
- Instruction No. 18.300 Shooting/Throwing at Occupied Vehicle
- Instruction No. 18.350 Shooting From Vehicle
- Instruction No. 18.400 Use of Machine Gun for Crime of Violence
- Instruction No. 18.500 Use of "Sawed—Off" Shotgun for Crime of Violence
- Instruction No. 18.600 Carrying Concealed Weapon
- Instruction No. 18.610 Possession of Firearm While in Possession of Certain Controlled Substances
- Instruction No. 18.611 Possession, Use or Display of

Firearm in Committing or Attempting to Commit Manufacture, Sale, Distribution, Possession With Intent to Manufacture, Sell, Distribute a Schedule I or Schedule II Substance or More Than One Pound of Marijuana

- Instruction No. 18.612 Possession of Firearm On or About the Person While in Possession of Certain Controlled Substances
- Instruction No. 18.620 Possession or Transportation of Firearm, Ammunition, Stun Weapon, or Explosive Material by Felon
- Instruction No. 18.625 Carrying Concealed Weapon by Felon
- Instruction No. 18.630 Manufacture, Import, Sale, Transfer or Possession of Plastic Firearm
- Instruction No. 18.650 False Statement on Consent Form for Firearms Dealer to Obtain Criminal History Record
- Instruction No. 18.660 Purchasing Firearm With Intent to Provide It to Person Who Is Ineligible to Acquire One From Dealer
- Instruction No. 18.700 Use or Display of Firearm in Committing or Attempting to Commit Murder, Rape, Robbery, Carjacking, Burglary, Malicious Wounding, Abduction, Forcible Sodomy, or Animate/ Inanimate Object Sexual Penetration
- Instruction No. 18.710 Pointing or Brandishing Firearm or Object Similar in Appearance to a Firearm
- Instruction No. 18.750 Throwing Object From a Place Higher Than One Story
- Instruction No. 18.900 Use or Attempted Use of Restricted Ammunition in Committing or Attempting to Commit Crime
- Instruction No. 18.910 Pointing or Brandishing a Machete or Other Bladed Weapon
- Instruction No. 18.920 Reckless Handling of a Firearm—Misdemeanor
- Instruction No. 18.930 Reckless Handling of a Firearm—Felony
- Instruction No. 21.100 Driving While Under the Influence of Alcohol and/or Drugs (Including "Per Se" Offenses)
- Instruction No. 21.150 Maiming—Under the Influence
- Instruction No. 21.210 Serious Bodily Injury—Definition
- Instruction No. 22.100 Schedule I or II Controlled Substance—Manufacturing
- Instruction No. 22.120 Marijuana—Manufacturing—Not for Own Use
- Instruction No. 22.200 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation

- Instruction No. 22.220 Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation
- Instruction No. 22.240 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation
- Instruction No. 22.260 Marijuana—Selling, Giving, or Distributing: Evidence of Accommodation
- Instruction No. 22.270 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—28 Grams or More—§ 18.2-248.03(A)
- Instruction No. 22.275 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—227 Grams or More—§ 18.2-248.03(B)
- Instruction No. 22.277 Manufacturing Methamphetamine While a Minor or Incapacitated Person is Present Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation
- Instruction No. 22.310 Marijuana—Possession With Intent to Manufacture—Not for Own Use
- Instruction No. 22.320 Marijuana—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation
- Instruction No. 22.360 Schedule I or II Controlled Substance—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation
- Instruction No. 22.370 Marijuana—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation
- Instruction No. 22.400 Schedule III, IV or V Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute: No Evidence of Accommodation
- Instruction No. 22.410 Schedule III or IV Controlled Substance—Selling, Giving, Distributing or Possessing With the Intent to Distribute: Evidence of Accommodation
- Instruction No. 22.500(a) Schedule I, II, or III Controlled Substance—Possession
- Instruction No. 22.500(b) Possession of a Schedule IV Controlled Substance
- Instruction No. 22.500(c) Possession of a Schedule V Controlled Substance
- Instruction No. 22.500(d) Possession of a Schedule VI Controlled Substance
- Instruction No. 22.520 Marijuana—Possession
- Instruction No. 22.600 Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to

Persons Under 18

- Instruction No. 22.610 Methamphetamine Precursor Chemicals—Possession with Intent to Manufacture Methamphetamine, Methcathinone or Amphetamine
- Instruction No. 22.650 Controlled Substance, Imitation Controlled Substance, Marijuana—Manufacture, Distribution, or Possession With Intent to Distribute on or Near Educational, Child Day Center or Recreational Property
- Instruction No. 22.700 Drug Paraphernalia—Sale or Possession With Intent to Sell
- Instruction No. 22.701 Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant
- Instruction No. 22.800 Imitation Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute
- Instruction No. 22.805 Imitation Controlled Substance—Definition
- Instruction No. 22.900 Anabolic Steroid—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute
- Instruction No. 22.910 Transporting Controlled Substances Into The Commonwealth
- Instruction No. 23.100 Embezzlement
- Instruction No. P23.100(b) Embezzlement (Misdemeanor)
- Instruction No. 24.100 Extortion—General
- Instruction No. 24.200 Stalking (Subsequent Offense)
- Instruction No. 24.500 Threats—General
- Instruction No. 24.600 Threats on School Grounds, on School Buses, or at School—Sponsored Events
- Instruction No. 26.100 Calling or Summoning Emergency Medical Services Vehicle or Firefighting Apparatus Without Just Cause
- Instruction No. 26.200 Failure to Perform Promise to Deliver Crop
- Instruction No. 26.250 Failure to Perform Promise for Construction, Etc.
- Instruction No. 26.300 Governmental Fraud—Misrepresentation
- Instruction No. 26.400 Filing False Lien or Encumbrance Against Another
- Instruction No. 26.500 Money Laundering—Financial Transaction
- Instruction No. 26.700 Money Laundering—Conversion of Cash Into Negotiable Instruments or Electronic Funds
- Instruction No. 27.100 Obtaining Signature by False Pretense

- Instruction No. 27.150 Obtaining Money or Property by False Pretense
- Instruction No. 27.200 Obtaining or Attempting to Obtain Drug By Using False Name
- Instruction No. 27.500 Identity Theft
- Instruction No. 28.100 Using False Statement to Obtain Property or Credit
- Instruction No. 29.100 Bigamy—Second Marriage in Virginia
- Instruction No. 29.120 Bigamy—Second Marriage Outside Virginia
- Instruction No. 29.300 Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent
- Instruction No. P29.300 Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent
- Instruction No. 29.320 Taking Indecent Liberties With Children by Person in Custodial or Supervisory Relationship
- Instruction No. 29.330 Child Abuse or Neglect—Serious Injury
- Instruction No. 29.340 Child Abuse or Neglect—No Serious Injury
- Instruction No. 29.400 Production, etc., of Child Pornography
- Instruction No. P29.400 Production, etc., of Child Pornography
- Instruction No. 29.410 Possession of Child Pornography
- Instruction No. 29.420 Distribution, etc., of Child Pornography
- Instruction No. 29.430 Definition of Child Pornography
- Instruction No. 29.450 Use of Computer, etc. For Purposes of Solicitation of Minor
- Instruction No. 29.500 Contributing to Delinquency of Minor
- Instruction No. 30.100 Forgery—General
- Instruction No. 30.200 Falsely Obtaining Signature
- Instruction No. 30.300 Uttering
- Instruction No. 30.600 Forging Public Record
- Instruction No. 30.620 Uttering Forged Public Record
- Instruction No. 30.700 Forgery Equipment
- Instruction No. P30.700 Forgery Equipment
- Instruction No. 31.100 Habitual Offender—Combined Instruction
- Instruction No. 32.100 Hit and Run—Death, Personal Injury or Damage to Attended Property—Felony
- Instruction No. 32.200 Hit and Run—Damage of $1000 or Less to Property—Misdemeanor
- Instruction No. 33.100 Aggravated Murder
- Instruction No. P33.126 Aggravated Murder—Ineligibility for Parole

- Instruction No. P33.130 Aggravated Murder
- Instruction No. 33.200(a) First Degree Murder
- Instruction No. 33.200(b) First Degree Felony Murder
- Instruction No. 33.205 "In the Commission of"—Definition for Aggravated Murder and First Degree Felony Murder
- Instruction No. 33.320 Second Degree Murder
- Instruction No. 33.340 Second Degree Felony Homicide
- Instruction No. 33.500 Voluntary Manslaughter
- Instruction No. 33.600 Involuntary Manslaughter—General
- Instruction No. 33.650 Involuntary Manslaughter, Motor Vehicle—Under the Influence
- Instruction No. 33.660 Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence
- Instruction No. 33.700 Lesser Included Offenses
- Instruction No. 34.100 Illegal Gambling—General
- Instruction No. 34.200 Operating Illegal Gambling Enterprise
- Instruction No. 34.220 Operating Illegal Gambling Enterprise for More Than Thirty Days or With Daily Gross Revenue of $2,000 or More
- Instruction No. 34.240 Definition of Operator
- Instruction No. 34.300 Accessory to Gambling Activity
- Instruction No. 35.100 Obstructing Justice (Law Enforcement Officer)
- Instruction No. 35.300 Obstructing Administration of Justice—Felony
- Instruction No. 35.400 Giving False Reports to Law Enforcement Officials
- Instruction No. 35.600 Failure to Appear
- Instruction No. 35.700 Obstruction—Resisting Execution of Legal Process
- Instruction No. 35.800 Sex Offender—False Information, Failure to Register, Reregister, or Verify Registration Information—Felony
- Instruction No. 35.900 Giving False Identity to Law Enforcement Officer
- Instruction No. 36.100 Grand Larceny—General
- Instruction No. 36.120 Grand Larceny—From Person
- Instruction No. 36.200 Petit Larceny—General
- Instruction No. 36.210 Petit Larceny—Second Offense
- Instruction No. 36.220 Petit Larceny—Third or Subsequent Offense
- Instruction No. 36.400 Grand Larceny—Receiving Stolen Goods
- Instruction No. 36.500 Unauthorized Use—Felony
- Instruction No. 36.600 Larceny of Certain Animals

- Instruction No. 36.800 Grand Larceny—Concealment of Goods or Merchandise
- Instruction No. 36.820 Petit Larceny—Concealment of Goods or Merchandise
- Instruction No. 36.900 Tampering With Metering Device
- Instruction No. 37.050 Malicious Wounding—Aggravated
- Instruction No. 37.100 Malicious Wounding and Lesser Included Offenses—Combined Instruction
- Instruction No. 37.150 Strangulation
- Instruction No. 37.340 Assault and Battery of Judge, Magistrate, Law—Enforcement Officer, Correctional Officer, Firefighter, or Emergency Medical Services Personnel
- Instruction No. 37.360 Assault and Battery Against a Family or Household Member—Third or Subsequent Offense
- Instruction No. 38.100 Wounding With Intent to Maim by Mob
- Instruction No. 38.150 Murder by Mob
- Instruction No. 38.175 Acts of Violence by Mob
- Instruction No. 38.300 Participating in Criminal Act as Member of or Participant in a Criminal Street Gang
- Instruction No. 38.400 Adult participating in Criminal Act as a Member of or Participant in a Criminal Street Gang—Gang Includes Juvenile
- Instruction No. 38.500 Recruitment for a Criminal Street Gang
- Instruction No. 38.510 Adult Recruitment of Juvenile for Participation or Membership in Criminal Street Gang
- Instruction No. 39.100 Nonsupport of Spouse or Children
- Instruction No. 39.300 Nonsupport of Parents by Children
- Instruction No. 40.200 Possession of Obscene Item With Intent to Sell
- Instruction No. 40.300 Presentation of Obscene Motion Picture
- Instruction No. 40.400 Indecent Exposure
- Instruction No. 41.100 Perjury—General
- Instruction No. 41.500 Perjury—Differing Testimony by Defendant on Separate Occasions
- Instruction No. 41.600 Perjury—Procuring Another to Give False Testimony Subornation of Perjury
- Instruction No. 42.100 Escape—General
- Instruction No. 42.110 Escape—General (Felon)
- Instruction No. 42.120 Escape from Custody By Force or Violence
- Instruction No. 42.140 Escape—Without Force or

Violence (Misdemeanor or Probation or Parole Violation)

- Instruction No. 42.150 Escape—Without Force or Violence (Charged With or Convicted of Felony)
- Instruction No. 42.160 Escape—Furlough
- Instruction No. 42.170 Escape—Work Release (State Prisoner)
- Instruction No. 42.180 Escape—Work Release (Jail Inmate)
- Instruction No. 42.200 Escape—Aiding (Felony)
- Instruction No. 42.220 Escape—Aiding (Misdemeanor)
- Instruction No. 42.240 Escape—Voluntarily Allowing Person Charged with Felony or Felon to Escape
- Instruction No. 42.300 Contraband—Delivery of Marijuana or Controlled Drug to Prisoner
- Instruction No. 42.320 Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner
- Instruction No. 42.400 Contraband—Possession of Firearm or Firearm Ammunition by Prisoner
- Instruction No. 42.500 Prisoner—Injuries to Non-Prisoner
- Instruction No. 42.520 Probationer (Parolee)—Injuries to Probation (Parole) Officer
- Instruction No. 43.100 Maiming, Killing, or Poisoning Animals
- Instruction No. 43.200 Breaking, Injuring, Defacing, Destroying, or Preventing the Operation of Vehicle, Aircraft, or Boat
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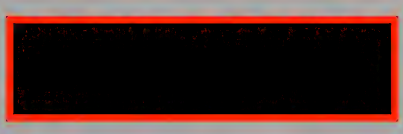

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FOREWORD

The model jury instruction project began in Virginia in 1975 with the appointment by former Chief Justice Lawrence W. I'Anson of a committee of judges and attorneys charged with preparing model instructions for use in the courts of this Commonwealth. Since then, the members of the Committee have worked diligently to produce model instructions that accurately represent the established case and statutory law of the Commonwealth, and they have kept their work up-to-date with annual supplements and revised editions.

The attorneys, editors, and staff at LexisNexis would like to warmly thank the Model Jury Instructions Committee for their continued commitment and excellent work.

September, 2021

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The Supreme Court of Virginia and the Court of Appeals of Virginia have neither adopted nor approved this publication.

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HOW TO USE THIS BOOK

(1) Model Instructions—Edition Preparation and Updating

To receive the maximum benefit from the Virginia Model Jury Instructions, please read this chapter before you use the instructions. It discusses the preparation and updating of the volumes, the format and intended uses of the model instructions, and the research information associated with them, as well as significant principles of Virginia law concerning the role and limitations on the use of jury instructions in general.

The title page for each volume of the Virginia Model Jury Instructions indicates the edition and the cumulative scope of statutory and case law coverage. The digital and printed editions are revised annually, and are identical to the published instructions.

Each year, members of the Model Jury Instructions Committee study case law and legislative developments in detail, discuss changes at face-to-face meetings, and make every effort to ensure that each instruction topic is thoroughly reviewed and reflects the legislative changes to and judicial interpretations and applications of Virginia law occurring since publication of the previous edition. Cases and legislation are also analyzed to determine whether changes should be made to the instructions themselves, or to their associated Sources and Authority statements (or both), and whether additional instructions should be provided. Proposed changes and additions are discussed and approved or rejected during the annual Committee meetings devoted to comprehensive review of the publication contents: one focused on the model criminal instructions, typically occurring in May, and the other focused on the model civil instructions, typically occurring in October.

Each annual replacement volume of the Virginia Model Jury Instructions publication includes a revised table of cases, index to code sections, and subject matter index. If instructions are added or deleted, a revised table of contents is provided.

(2) Model Instructions—Format and Use

As Virginia's appellate courts have observed, "[t]he purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict." *Delacruz v. Commonwealth, 11 Va. App. 335, 339, 398 S.E.2d 103, 105 (1990)* (quoting *Cooper v. Commonwealth, 2 Va. App. 497, 500, 345 S.E.2d 775, 777 (1986)*). The goal therefore, is to make instructions easy for the jury to understand. There are three characteristics of good jury instructions:

- Organization;

- Neutrality; and
- Simplicity.

Organization is crucial if the jurors are to understand the instructions. The instructions must be organized and presented in a logical sequence to help compensate for the jurors' lack of familiarity with legal concepts. Consistent with these principles, the Committee has made every effort to employ plain language in the model instructions, and to minimize the use of "legalese."

The model instructions presented in these volumes are designed to be straightforward, unbiased, and simple: the instructions state what the law is, and not what it is not.

Each model instruction is identified by number and title. Some instructions can be given just as they appear in the book. Many will require some modifications to make them fit the facts of a particular case. No book of instructions can possibly anticipate the infinite variety of facts that arise in litigation. The instructions provided in these volumes are models or patterns from which to construct instructions that are appropriate for each specific case. Therefore, an instruction can be modified—or even created—to fit the particular facts and circumstances.

When modifying a model instruction, or when crafting a custom instruction "from scratch," it is important to bear in mind that Virginia's appellate courts have often cautioned against using the language appearing in a specific appellate opinion for a jury instruction, given that appellate opinions are meant to provide a rationale for a decision, and therefore "may not translate immutably into jury instructions." *Virginia Power v. Dungee, 258 Va. 235, 251, 520 S.E.2d 164, 173 (1999).* Accordingly, the indiscriminate use of language from appellate opinions in a jury instruction is discouraged, because statements appearing in such opinions, while authority for the propositions set forth there, are not necessarily proper language for jury instructions. *Seaton v. Commonwealth, 42 Va. App. 739, 753–54, 595 S.E.2d 9, 20–21 (2004); see also Cain v. Lee, 290 Va. 129, 135, 772 S.E.2d 894, 897 (2015); Blondel v. Hays, 241 Va. 467, 474, 403 S.E.2d 340, 344 (1991); Oak Knolls Realty v. Thomas, 212 Va. 396, 397, 184 S.E.2d 809, 810 (1971).* For example, language appearing in these opinions may include argumentative statements about legal matters that is inappropriate for consideration by the jury. *Cain, 290 Va. at 135, 772 S.E.2d at 897; Abernathy v. Emporia Mfg. Co., 122 Va. 406, 413, 95 S.E. 418, 420 (1918).* Nevertheless, while "it may not be always advisable to copy the language of the courts as applied to the peculiar facts of one case then under consideration, and to embody such language in an instruction in another and a different case, it may properly be done if the same legal principle involved is applicable." *Virginia Ry. & Power Co. v. Burr, 145 Va. 338, 346, 133 S.E. 776, 778 (1926).*

It is also important to bear in mind that, when modifying a model instruction, or when crafting a custom instruction "from scratch," the General Assembly has specifically provided that, in both civil and criminal cases, a proposed instruction that accurately states the applicable law "shall not be withheld from the jury solely for its nonconformance with the model jury instructions." Va. Code Ann. § 8.01-379.2 (civil cases); Va. Code Ann. § 19.2-263.2 (criminal cases). See also *Howsare v. Common-*

wealth, 293 Va. 439, 444, 799 S.E.2d 512, 515 (2017); *Jeffress v. Virginia Ry. & P. Co., 127 Va. 694, 714, 104 S.E. 393, 399 (1920)* ("[I]t is well settled that each party has the right to have presented to the jury its contention upon vital points in language to be chosen by it, provided such language is in keeping with the law."); *Banner v. Commonwealth, 204 Va. 640, 645–46, 133 S.E.2d 305, 309 (1963)* ("It cannot be questioned that both the Commonwealth and the defendant are entitled to appropriate instructions telling the jury the law applicable to each version of the case, provided such instructions are based upon the evidence adduced[, a]nd each party may employ language of its own choosing so long as it is in keeping with the law."). It has been expressly recognized that, while it is permissible to draft instructions using statutory language, other language may be used if it does not change the meaning of the law. *Fitzgerald v. Commonwealth, 223 Va. 615, 632, 292 S.E.2d 798, 808 (1982).*

For simplicity's sake, the model instructions have been primarily drafted as if the parties were individual males. The same style applies to any references to non-parties (e.g., a witness, the victim) in the model instructions. Where a party or non-party is female, you should modify the instruction by inserting her name or female pronouns as appropriate. If a corporation, partnership, or other business entity is a party, you will need to insert the name of the organization and change the pronouns for consistency. You may also want to alter the instruction to specify the appropriate party by name or party designation, when doing so will help make the instructions easier for the jury to understand.

Some model instructions also feature brackets and parentheses:

- **Brackets** contain either additional language that does not always apply when an instruction is given, or alternative language to be used instead of some of the wording in the instruction that precedes the brackets. Bracketed language should only be added to an instruction if it is supported by the evidence. Some instructions feature multiple options for additional or alternative language within a single set of brackets, divided by a semicolon. You will have to read through the instruction to see exactly where to make an addition or substitution by using the bracketed language options, and modify the instruction so that only the pertinent option or options are presented to the jury when the instruction is given. The brackets should be omitted from the written version of the instruction that is provided to the jury.
- **Language in parentheses** indicates that additional information, such as a certain name, a specific description of some item, or other context-specific language is required to complete the instruction. When agency questions arise, for example, the only way to make the instruction intelligible is to name the principal, the agent and the third party. Similarly, in defamation cases, the offending words may either need to be precisely set out, or referred to specifically, such as by the date of a letter or other writing that contains them. Places in an instruction where this information should be supplied will be indicated using parenthetical expressions, which serve as placeholders. Similarly, the parentheses should be omitted from the written version of the instruction that is provided to the jury.

Each chapter of instructions is organized as follows:

(a) Table of Contents.

The first page in each chapter is a Table of Contents for that chapter. It will give you an outline of the overall coverage of the chapter, and will help you locate a particular instruction.

(b) Scope Note.

The Scope Note for each chapter indicates depth and breadth of coverage the Committee has given to the topic(s) addressed in that chapter. In addition, it may alert you to any significant statutes or legal principles that apply to the topic(s) in a general sense.

The scope note may also explain specific exclusions and refer to the cases and statutes that could be consulted in order to prepare the appropriate instructions for the material that has been excluded.

In addition, the scope note discusses how each instruction relates to the others in the chapter, and to instructions appearing in other chapters, where applicable.

(c) Instructions.

Each instruction has a number and a title for identification purposes, and contains the instruction language that the Committee recommends. Substantive instructions feature a number with no letter designator preceding them, and address the elements of the crime in a finding instruction format (e.g., Instruction No. 4.100 Abduction—General), or possibly applicable defenses (e.g., Instruction No. 52.200 Claim of Right), as well as providing definitions of key terms featured in the model instructions (e.g., Instruction No. 33.220 Malice—Definition), or similar pertinent information (e.g., Instruction No. 33.240 Malice—Inference From Use of Deadly Weapon). Instructions applicable to the sentencing phase for a crime feature the same number as the model instruction addressing the substantive elements of the underlying crime, but are preceded by a "P" designator (e.g., Instruction No. P4.100 Abduction—General). Where separate alternative instructions dealing with the same topic are set out, the numbers of those instructions feature a parenthetical lowercase letter suffix (e.g., Instruction No. P7.100(a) Burning Dwelling—Occupied).

(d) Sources & Authority statements.

The Sources & Authority statement accompanying each model instruction is a concise overview of the legal sources and authorities upon which the instruction is based. It contains most of the leading references that you may wish to consult to learn more about the law on which the instruction is based, and is intended to serve as an ideal starting point for your research. The Sources and Authority statement is only a starting point, however. No attempt has been made to make the case citations exhaustive. The fact that a case is cited in the discussion does not necessarily mean that it directly supports the instruction; it may only relate to the instruction, or indicate that an instruction is appropriate in certain circumstances. To be assured of the applicability of an instruction to the specific facts of your case, additional research may be required.

The Sources & Authority statement may be divided into separate sections: Governing Statutes, Case Authority (or, Principal Case Authority and Other Relevant Decisions), Practice Commentary, Practice Pointer(s), Alerts, and Research References. When there is no relevant material for a section, the word "None" is used. Each of these sections is analyzed and explained in detail below.

GOVERNING STATUTE: This section lists the statute(s) from which the instruction was drawn, and any other statute(s) that might be relevant.

CASE AUTHORITY: This section cites the leading cases that support or relate to the principles that are contained in the instruction. A review of these cases provides a brief sketch concerning the judicial evolution of the law on which the instruction is based. Cases are listed in reverse chronological order (most recent to oldest), with opinions of the Supreme Court of Virginia listed before opinions of the Court of Appeals of Virginia only when opinions from both courts are released in the same year.

Where numerous decisions have been examined, cases may be divided into PRINCIPAL CASE AUTHORITY and OTHER RELEVANT DECISIONS categories for ease of use.

"Principal Case Authority" assists you in identifying the leading cases to cite, either for explicit appellate court approval of an instruction, or for approval of or agreement with specific language used to describe a legal point or issue addressed in an instruction, or with regard to a legal doctrine or rule embraced by an instruction.

"Other Relevant Decisions" are pertinent in that they discuss the elements of the crime or defense addressed in an instruction, apply the legal doctrine or rule embraced by an instruction, or otherwise indicate support for such legal doctrine or rule.

PRACTICE COMMENTARY: This section provides a discussion of other aspects of using the instructions that are not as urgent as the items in the Alert. Often it gives a discussion of the case law, highlights the legal principles found in the instruction, and summarizes the main issues in this area of the law. The Practice Commentary may quote crucial language from a leading opinion, and will include language indicating when a specific model instruction, or the language appearing in it, has either been expressly approved or disapproved by Virginia's appellate courts. In addition, this section sets out any general points that must be kept in mind when the instruction is used, and may contain cross-references to other instructions.

☞ ***PRACTICE POINTER***: Prompted by issues addressed in the instructions and by the topical research on which they are based, these entries make suggestions or note particular strategic or planning concerns that may be useful in preparing for or conducting the trial.

ALERTS: • This section warns the user of significant considerations involving the language of the instruction or the substantive law on which it is founded. It often points out unresolved ambiguities that exist in the cases or stresses the limitations of a particular instruction. It also discusses problems that may arise when you use the instruction.

***RESEARCH REFERENCES*:** This section lists additional relevant authorities and sources of information that can be consulted for additional research Citations to the most current editions of leading Virginia legal encyclopedias and treatises on Virginia law are provided. Please note that these references do not specify the particular year or edition of the works being cited, as these sources are digital and are continuously updated by their respective publishers. Users should simply consult the most recent edition of these sources that is available to them, whether printed or digital.

(3) Summary of Contents—Criminal volumes

This volume provides a comprehensive set of general and specific model instructions relating to crimes and defenses as recognized under Virginia law. These instructions are designed to serve as guides for drafting instructions that are simple, impartial, clear, and concise, so that in every criminal case the jury may be fully, fairly, and properly instructed. General instructions applicable to most cases are found in Chapter 2. Chapter 3 contains instructions on principals, accessories and accomplices. Chapters 4 through 51 include instructions on substantive crimes and are arranged alphabetically by topic. Chapter 52 has instructions on general defenses to crimes, and Chapter 53 addresses diminished responsibility. Chapter 54 contains instructions on punishment for Class 2 to Class 6 felonies and Class 1 misdemeanor convictions. The conclusion of the volume contains a list of cited cases, cited statutes, and a subject matter index.

For felonies and Class 1 misdemeanors, two instructions are given: one with just a number, which is intended to be given during the merits phase of the proceedings, and the other with a letter "P" preceding the same number, indicating that the instruction is to be given at the punishment phase if the defendant is found guilty. PLEASE NOTE THAT THE INSTRUCTION DESIGNATIONS, AS WELL AS THE INSTRUCTION TITLES, SHOULD NOT BE SHOWN ON THE INSTRUCTIONS PRESENTED TO THE JURY. The same applies for any Notes that may appear after the language of an instruction, unless otherwise indicated.

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A).)

(4) Sample Instructions

To aid you in the use of the model criminal instructions appearing in these volumes, two sample instructions are set out below, accompanied by a discussion of their features. Becoming familiar with the features of these sample instructions will help you in selecting the model instructions from these volumes that you need to fit the particular facts and circumstances of your case, and modifying the model instructions to accommodate them.

Sample merits phase instruction: Forgery—General (based on Instruction No. 30.100)

The defendant is charged with the crime of forgery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant, with intent to defraud, [falsely made; materially altered]

(describe writing);

(2) Without authority to do so; and

(3) To the prejudice of another's right.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). The bracketed language should only be used when such request has been timely made by the defendant.)

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Sample sentencing phase instruction: Forgery—General (based on Instruction No. P30.100)

You have found the defendant guilty of the crime of forgery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295 (A). The bracketed language should only be used when such request has been timely made by the defendant.)

Sample instructions: Discussion of Features

Like most of the criminal instructions, the sample merits phase instruction set out above lists each separate element of the crime to give the jury a broad overview of the offense for which the defendant is being tried, as well as a "checklist" of every specific element that the Commonwealth must prove in order to obtain a conviction. The sample sentencing phase instruction also specifies every alternative form of punishment that the

jury is entitled to consider, provided the defendant has timely and properly requested to be sentenced by the jury in accordance with Va. Code Ann. § 19.2-295(A). By providing jurors with a concise list of both the elements of the offense and the possible forms of punishment, the instructions make it easier for them to identify and isolate the key issues in the case.

The sample instructions also illustrate how brackets and parentheses are used in the model criminal instructions so that they can be tailored to fit the facts of each individual case. Within the brackets are alternative ways in which the offense in question can be committed. For example, in a forgery case a writing may be "falsely made or "materially altered." These phrases appear in brackets and regular typeface in the sample instruction. Only the appropriate phrase should be included when the instruction is given, and the brackets should be omitted from the written version of the instruction that is provided to the jury.

Similarly, the language in parentheses and regular typeface indicates that a certain name or a specific description of some item is required to complete the instruction. For example, in all forgery cases, it is necessary to describe the particular writing that led to the charges against the defendant. Once again, this information is to be based on the facts of the particular case. As is the case with any brackets that might appear in a model instruction, the parentheses should also be omitted from the written version of the instruction that is provided to the jury.

(5) Jury Instructions—General Role and Limitations

Purpose. The purpose of jury instructions is to enable the jury to reach the correct conclusion. See *Delacruz v. Commonwealth, 11 Va. App. 335, 339, 398 S.E.2d 103, 105 (1990)* (quoting *Cooper v. Commonwealth, 2 Va. App. 497, 500, 345 S.E.2d 775, 777 (1986)*. To that end, instructions should be simple, impartial, clear, and concise. *Bryant v. Commonwealth, 216 Va. 390, 392, 219 S.E.2d 669, 671 (1975)*. Instructions must not confuse the jury, and should aid the jurors in their deliberations, rather than make the deliberations more difficult. *Castle v. Lester, 272 Va. 591, 636 S.E.2d 342 (2006)*; *Honsinger v. Egan, 266 Va. 269, 274, 585 S.E.2d 597, 600 (2003)*; *Gaalaas v. Morrison, 233 Va. 148, 156, 353 S.E.2d 898, 902 (1987)*; *H. W. Miller Trucking Co. v. Flood, 203 Va. 934, 936, 128 S.E.2d 437, 439 (1962)*; *Southers v. Price, 211 Va. 469, 473, 178 S.E.2d 685, 688 (1971)*.

Counsel's role. Generally, it is considered to be the duty of counsel to aid the court in the function of instructing the jury. *DuPont v. Snead, 124 Va. 177, 187–88, 97 S.E. 812, 815 (1919)* (observing that "[t]he trial court . . . cannot be required to instruct the jury generally in the case" and that it is not "the practice in [Virginia] for the trial court to give instructions unless requested," subject to an exception applicable in criminal cases, which is discussed below). The very purpose of permitting requests for instructions is so that each of the litigants have an opportunity to fully inform the jury as to the law and their respective theories of the case. See, e.g., *Womack v. Circle, 70 Va. (29 Gratt.) 192, 208 (1877)* ("It has not been the practice in Virginia, as in England, for the courts to charge the jury upon the law of the case, and it is not error to refuse to give such charge, or to refuse to instruct generally upon the law of the case. If either party desire any specific instruction to be given, he has the right to ask it, and the court

is bound to give it, provided it expounds the law correctly upon any evidence before the jury."). In addition, it is "axiomatic that a party is entitled to have jury instructions that address his or her theory of the case so long as that theory is supported both by law and fact." *Honsinger, 266 Va. at 274, 585 S.E.2d at 600.* Accordingly, the court should instruct the jury on the law that is supported by the evidence to the extent necessary to allow each side to have a basis for arguing its theory to the jury. *Price v. Taylor, 251 Va. 82, 85, 466 S.E.2d 87, 88 (1996)*; *Bowers v. May, 233 Va. 411, 413–14, 357 S.E.2d 29, 30 (1987). See also Banner v. Commonwealth, 204 Va. 640, 645–46, 133 S.E.2d 305, 309 (1963).* An instruction that accurately states the law applicable to the case shall not be refused because it is not one of these model jury instructions. Va. Code Ann. § 19.2-263.2; *Howsare v. Commonwealth, 293 Va. 439, 444, 799 S.E.2d 512, 515 (2017).*

However, not all arguments that counsel, or the parties, intend to make warrant a jury instruction.

Evidence supporting instruction. First and foremost, only those arguments and theories that are supported by appreciable evidence in the record entitle a litigant to request that an instruction be given embodying such arguments and theories. *Realty Co. of Va. v. Burcum, 129 Va. 466, 470, 106 S.E. 375, 376 (1921)* (observing that "merely because a plaintiff, or, for that matter, a defendant, has a theory of the case, he is [not] thereby entitled to an instruction upon that theory," because "[a] *sine qua non* of his right to an instruction is that it is supported by some appreciable evidence"); *see also Harris v. Commonwealth, 134 Va. 688, 114 S.E. 597 (1922)* (same). "An instruction cannot be given because it is in line with a litigant's theory[,] unless that theory finds support in the evidence." *Campbell Soup Co. v. Davis, 163 Va. 89, 95, 175 S.E. 743, 746 (1934)*; *Williams Paving Co. v. Kreidl, 200 Va. 196, 202, 104 S.E.2d 758, 762 (1958).* Accordingly, a court does not err in refusing to grant instructions requested by a party that are in line with its theory of the case where there is no evidence in the record supporting that theory. *Campbell Soup Co., 163 Va. at 95, 175 S.E. at 746*; *Penoso v. D. Pender Grocery Co., 177 Va. 245, 249, 13 S.E.2d 310, 312 (1941)*; *Williams Paving Co., 200 Va. at 201–02, 104 S.E.2d at 761–62.* See also *Waters v. Commonwealth, 39 Va. App. 72, 79–80, 569 S.E.2d 763, 766–67 (2002)* (finding no error in trial court's refusal to give requested instruction on defense of accident, where no evidence supported that defense); *Helmick v. Commonwealth, 38 Va. App. 558, 568–69, 567 S.E.2d 551, 556–57 (2002)* (same). Indeed, instructions that are nothing more than abstract statements of law are improper, even if they are technically accurate, where they are inapplicable to the facts of the case. *Juniper v. Commonwealth, 271 Va. 362, 431, 626 S.E.2d 383, 426 (2006)* (observing that "even if jury instructions contain accurate statements of law, a trial court does not abuse its discretion by refusing [an] instruction if it is not applicable to the facts and circumstances of the case, or if it would have created confusion and would have been misleading" if given); *Rosen v. Greifenberger, 257 Va. 373, 380, 513 S.E.2d 861, 864–65 (1999)*; *Hubbard v. Commonwealth, 243 Va. 1, 15, 413 S.E.2d 875, 883 (1992)*; *Hatcher v. Commonwealth, 218 Va. 811, 813–14, 241 S.E.2d 756, 758 (1978).* See also *Bolyard v. Commonwealth, 11 Va. App. 274, 277, 397 S.E.2d 894, 896 (1990)*; *Stewart v. Commonwealth, 10 Va.*

App. 563, 570, 394 S.E.2d 509, 513 (1990). Likewise, it is well established that in both civil and criminal litigation, more than a scintilla of evidence is necessary to support an instruction. *Turman v. Commonwealth, 276 Va. 558, 564, 667 S.E.2d 767, 770 (2008)*; *Porter v. Commonwealth, 276 Va. 203, 242, 661 S.E.2d 415, 434 (2008)*; *Schlimmer v. Poverty Hunt Club, 268 Va. 74, 78, 597 S.E.2d 43, 45 (2004).*

Multiple instructions on one issue avoided. Secondly, multiple instructions covering the same legal principles are undesirable, when one instruction correctly states the law. *Tuggle v. Commonwealth, 228 Va. 493, 508, 323 S.E.2d 539, 548 (1984)*; *Wilson v. Commonwealth, 25 Va. App. 263, 275, 487 S.E.2d 857, 863 (1997).* This is so because multiple instructions on the same principle can result in juror confusion and thereby unnecessarily increase the difficulty of deliberations. *Honsinger, 266 Va. at 274, 585 S.E.2d at 600*; *Morse v. Commonwealth, 17 Va. App. 627, 633, 440 S.E.2d 145, 149 (1994)*; *King v. Commonwealth, 2 Va. App. 708, 711, 347 S.E.2d 530, 531 (1986).* Accordingly, refusal to permit the jury to receive other instructions on a legal principle fully and fairly covered by the instructions already granted is not an abuse of discretion. *Watson v. Commonwealth, 298 Va. 197, 207–10, 835 S.E.2d 906, 911–13 (2019)*; *Poliquin v. Daniels, 254 Va. 51, 59, 486 S.E.2d 530, 535 (1997)*; *Eaton v. Commonwealth, 240 Va. 236, 255, 397 S.E.2d 385, 397 (1990)*; *Stockton v. Commonwealth, 227 Va. 124, 145, 314 S.E.2d 371, 384 (1984)*; *Cox v. Mabe, 214 Va. 705, 709, 204 S.E.2d 253, 257 (1974).* In this same vein, an instruction is improper if it singles out one portion of the evidence, and unduly emphasizes it over other facts equally pertinent to the jury's resolution of an issue. *Hilton v. Commonwealth, 293 Va. 293, 302, 797 S.E.2d 781, 786 (2017)*; *Snyder v. Commonwealth, 220 Va. 792, 797, 263 S.E.2d 55, 58 (1980)*; *Norfolk Hosiery & Underwear Mills v. Aetna Hosiery Co. 124 Va. 221, 236, 98 S.E. 43, 47 (1919)*; *New York, Philadelphia & Norfolk Ry. v. Thomas, 92 Va. 606, 609, 24 S.E. 264, 265 (1896).* As a result, where there are two conflicting theories of a case, the evidence is similarly in conflict, and each theory has been covered by a separate instruction, no other instruction should be given covering only one of such theories, as it would give undue emphasis to that theory. Nevertheless, under appropriate circumstances, it is not error to give another instruction covering both theories. *Washington & Old Dominion Ry. v. Ward, 119 Va. 334, 342–43, 89 S.E. 140, 143 (1916).* In addition, "[o]nce a jury is instructed regarding the use or limitations placed upon specific evidence, they are presumed to follow such instructions." *Lawson v. Commonwealth, 13 Va. App. 109, 112, 409 S.E.2d 466, 467 (1991)*; *Lewis v. Commonwealth, 8 Va. App. 574, 580, 383 S.E.2d 736, 740 (1989)*; *Lewis v. Commonwealth, 211 Va. 80, 84, 175 S.E.2d 236, 239 (1970).*

Misleading instructions. Thirdly, if an instruction may reasonably be regarded as having a tendency to mislead the jury, it is error to give it. *Castle, 272 Va. at 605, 636 S.E.2d at 349*; *H.W. Miller Trucking Co., 203 Va. at 937, 128 S.E.2d at 440.* The same is true of instructions that are "confusing and subject to misunderstanding." *Gaalaas, 233 Va. at 156, 353 S.E.2d at 902.* Accordingly, if multiple instructions are given dealing with the same topic, the instructions "should be qualified by a cross-reference to [one] another in a manner which will clearly convey to the jury the force and effect of the qualification." *Johnson v. Commonwealth, 220 Va. 146, 155, 255 S.E.2d 525, 530*

(1979); *Outlaw v. Pearce, 176 Va. 458, 469–70, 11 S.E.2d 600, 605 (1940)*. Failure to make all of the instructions, taken as a whole, a correct and clear statement of the law constitutes reversible error that is not harmless, even though individual instructions may have "unitary accuracy." *Johnson, 220 Va. at 155, 255 S.E.2d at 530. See also Darnell v. Commonwealth, 6 Va. App. 485, 492, 370 S.E.2d 717, 721 (1988)* (observing that "[i]n determining whether jury instructions are proper, we must read and consider them all together"); *Bowman v. Commonwealth, 174 Va. 461, 465, 5 S.E.2d 497, 499 (1939)* (same). Instructions that conflict, or that are inconsistent with each other, are to be avoided. *Norfolk Ry. & Light Co. v. Higgins, 108 Va. 324, 332, 61 S.E. 766, 768 (1908)* (stating that "where there are conflicting or inconsistent instructions given in a case, the verdict of the jury has to be set aside and a new trial awarded, as the court cannot say whether the jury were guided by the correct or incorrect instructions" and explaining that "this rule is too well established to require a citation of the authorities supporting it"); *Southern Ry. Co. v. Hansbrough, 107 Va. 733, 748, 60 S.E. 58, 64 (1908)* (instructions conflicting on a material point require a new trial); *Richmond Passenger & Power Co. v. Steger, 101 Va. 319, 321, 43 S.E. 612, 613 (1903)*.

Oral supplemental instructions; Instructions inviting speculation. Oral instructions are permissible when requested or when necessary to clarify a general statement in the written instructions. *Drinkard v. Commonwealth, 165 Va. 799, 183 S.E. 251, 253 (1936)*. A judicial response to a jury question is considered a legal instruction. *Ludwig v. Commonwealth, 52 Va. App. 1, 11, 660 S.E.2d 679, 683–84 (2008)*. However, it is improper to give oral instructions to the jury that allow it to speculate on what will happen after the trial. *Booker v. Commonwealth, 276 Va. 37, 42–43, 661 S.E.2d 461, 464 (2008)* (improper to give oral instruction on matters such as the authority of the trial court to reduce the active sentence). Indeed, an instruction permitting the jury to engage in conjecture and speculation is improper, regardless of its form. *See, e.g., Collins v. Smith, 198 Va. 778, 785, 96 S.E.2d 818, 824 (1957)* (jury should not have been permitted to speculate upon what "other warning and protective devices" or "other safety precautions" should have been employed in a negligence case); *Southern Ry. Co., 107 Va. at 748, 60 S.E. at 64*.

Noting inaccuracies. Where the instructions of the court do not cover all phases of the case or are inaccurate statements of the law, or are otherwise insufficient, counsel must call attention to the omission, inaccuracy, or insufficiency by appropriate objection. Except for good cause shown or to enable the appellate court to attain the ends of justice, counsel's failure to object precludes using the omission or inaccuracy as the basis for reversible error. See *Va. Sup. Ct. R. 5:25, 5A:18*. See also *Owens-Corning Fiberglas Ins. Corp. v. Watson, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992)* (two instructions read to the jury and imposing an inappropriate standard, absent any objection, become the law of the case and thereby bind the parties in the trial court and the appellate court on review); *Owens-Illinois v. Thomas Baker Real Estate, 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989)* (same); *Medical Center Hospitals v. Sharpless, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985)*; *Oden v. Salch, 237 Va. 525, 533, 379 S.E.2d 346, 351 (1989)*; *Commonwealth v. Millsaps, 232 Va. 502, 509, 352 S.E.2d 311, 315 (1987)*; *Norfolk & Portsmouth R.R. v. Barker, 221 Va. 924, 929, 275*

S.E.2d 613, 616 (1981); *Preston v. Land, 220 Va. 118, 120, 255 S.E.2d 509, 510 (1979)*; *Bostic v. Whited, 198 Va. 237, 239, 93 S.E.2d 334, 335 (1956).*

Timing of instructions. In all cases, the court instructs the jury before closing arguments. This practice is a matter of Virginia custom in civil cases, but is an express requirement in criminal cases. See Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 13.9, at 1107 (7th ed. 2020); Va. Sup. Ct. R. 3A:16(a). The trial judge considers the instructions as submitted by counsel for the parties, and ascertains whether any instructions require minor editing, substantive amendment, or rejection. In reviewing the proffered jury instructions, it is ultimately the responsibility of the trial judge to see that the applicable law has been clearly stated and that the instructions cover all issues which the evidence fairly raises. *Cooper v. Commonwealth, 277 Va. 377, 381, 673 S.E.2d 185, 187 (2009)*; *Landeck v. Commonwealth, 59 Va. App. 744, 758–59, 722 S.E.2d 643, 650 (2012).* Each finalized and approved instruction is then given separately, rather than in an overall charge as is commonly done in the federal system. See Sinclair & Middleditch, Virginia Civil Procedure § 13.9, at 1107. By custom as well, the judge reads these instructions to the jury and then allows written versions of those instructions to be taken to the jury room. *New York, Philadelphia & Norfolk Ry., 92 Va. at 609, 24 S.E. at 265.*

(6) Special Considerations Applicable to Jury Instructions in Criminal Cases

It is "elementary", in criminal cases, that "a jury must be informed as to the essential elements of the offense," because "a correct statement of the law is one of the essentials of a fair trial." *Darnell v. Commonwealth, 6 Va. App. 485, 488–89, 370 S.E.2d 717, 719 (1988)*; *Dowdy v. Commonwealth, 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979)* (reversing conviction due to trial court's failure to instruct the jury as to the essential elements of the crime). This is so because, unless the elements of the crimes charged are sufficiently defined by instructions that are available to the jury during its deliberations, the jury cannot properly ascertain whether the Commonwealth has carried its burden of proof. *Mason v. Commonwealth, 7 Va. App. 339, 346, 373 S.E.2d 603, 607 (1988)*; *Dowdy, 220 Va. at 116, 255 S.E.2d at 508.* In addition, instructions on some topics, such as the presumption of a defendant's innocence and the Commonwealth's burden to prove each element of the crime beyond a reasonable doubt, are deemed to be similarly essential in most every case. See, e.g., *Yager v. Commonwealth, 220 Va. 608, 615, 260 S.E.2d 251, 256 (1979)* (concluding that the facts presented "one of those rare cases in which it was not reversible error to refuse to instruct on presumption of innocence," but emphasizing that this decision "should not be taken as a signal that [the court] ha[s] softened . . . adherence to the principle, firmly engrafted in [Virginia] jurisprudence and a landmark of the law, that the accused in most every case is entitled to an instruction on presumption of innocence"); *Campbell v. Commonwealth, 162 Va. 818, 829, 174 S.E. 856, 861 (1934)* (lack of a presumption of innocence instruction is not sufficiently cured by giving a reasonable doubt instruction).

Mirroring the rule applicable in civil litigation, in criminal cases, both the Commonwealth and the defendant are entitled to appropriate instructions on the law applicable to the case. *Banner v. Commonwealth, 204 Va. 640, 645–46, 133 S.E.2d 305, 309 (1963).* This includes instructions addressing lesser-included offenses, but only if

those instructions are supported by the evidence. *Commonwealth v. Vaughn, 263 Va. 31, 35–36, 557 S.E.2d 220, 222–23 (2002).* More than a scintilla of evidence is necessary to support such an instruction. *Turman v. Commonwealth, 276 Va. 558, 564, 667 S.E.2d 767, 770 (2008)*; *Porter v. Commonwealth, 276 Va. 203, 242, 661 S.E.2d 415, 434 (2008).*

Unlike the rule applicable in civil cases, however, in a criminal trial, the trial court must correct or amend an improper instruction if a proper instruction on a subject or issue is necessary for the jury to understand and resolve the case. *Fishback v. Commonwealth, 260 Va. 104, 117, 532 S.E.2d 629, 635 (2000)*; *Whaley v. Commonwealth, 214 Va. 353, 355–56, 200 S.E.2d 556, 558 (1973)*; *Nelson v. Commonwealth, 143 Va. 579, 589–91, 130 S.E. 389, 392 (1925)*; *Sims v. Commonwealth, 134 Va. 736, 759–60, 115 S.E. 382, 390 (1922).* In addition, in criminal cases, "it would be not only proper, but the duty of the court, even though unasked, to instruct the jury upon the principles of law by which they should be governed in rendering their verdict." *Dejarnette v. Commonwealth, 75 Va. 867, 877 (1881)* (approving the trial court's use of instruction regarding the standard of legal insanity, though reversing because the instruction was flawed). *See also Hines v. Commonwealth, 217 Va. 905, 911, 234 S.E.2d 262, 266 (1977).* Accordingly, in a criminal case, when a principle of law is deemed to be materially vital to a defendant, it is reversible error for the trial court to fail to correct a defective instruction or verdict form when the error is patent or the subject of a proper objection even if the defendant fails to proffer alternative instructions or verdict forms. *Bailey v. Commonwealth, 259 Va. 723, 748, 529 S.E.2d 570, 584 (2000)*; *Bryant v. Commonwealth, 216 Va. 390, 393, 219 S.E.2d 669, 671 (1975)* (concluding that generally, a trial court "is not required to amend or correct an erroneous instruction, but the rule is subject to the limitation that when the principle of law is materially vital to a defendant in a criminal case, it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form" because the jury "should not be left in the dark on the subject"). But if the principle of law is not deemed to be materially vital, "a circuit court ordinarily does not have an affirmative duty to give a jury instruction on a particular legal principle when a criminal defendant fails to request that the jury be instructed on that principle." *Commonwealth v. Jerman, 263 Va. 88, 93, 556 S.E.2d 754, 757 (2002).* Instead, the usual rule applies: counsel "[i]s required to state any objection to the circuit court's instruction and to ask the court for any other instruction on the subject that he [or she] deem[s] necessary," and, the failure to do so bars appellate consideration of such objections and arguments. *Jerman, 263 Va. at 94, 556 S.E.2d at 757–58.*

Jury sentencing is a purely statutory right. *Ballard v. Commonwealth, 228 Va. 213, 217, 321 S.E.2d 284, 286 (1984)* Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). If a juvenile charged with a non-capital felony is transferred and tried as an adult in circuit court, the jury may determine only guilt or innocence; the court imposes sentencing if the defendant is found guilty of any offenses. Va. Code Ann.

§ 16.1-272. The constitutionality of this procedure was upheld in *Ballard*. Similarly, in an appeal of a finding of delinquency, the jury determines only guilt or innocence. Va. Code Ann. § 16.1-296(C).

***RESEARCH REFERENCES*:** For a discussion of early Virginia cases addressing jury instruction issues applicable in civil and criminal cases, see the memorandum attached to *Womack v. Circle, 70 Va. (29 Gratt.) 192, 211 (1877).*

For an overall discussion of Virginia cases addressing jury instruction issues, including modern opinions, see MICHIE'S JURISPRUDENCE, Instructions §§ 1–51.

For a discussion of specific principles applicable to jury instructions in criminal trials, see Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 18.1–18.4, and John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 60.6.

(7) Hypothetical Case

A hypothetical breaking and entering case is sketched below, to demonstrate which model instructions may be helpful to use in such a case. Each of the suggested instructions appears in this book. The arrangement of the suggested instructions is dictated by logic; the selection principles demonstrated here are adaptable to any case tried by jury.

(a) Background Facts of Hypothetical Breaking & Entering

Tom Smith was charged with unarmed breaking and entering of a house located in Danville on December 28, 2017. The owner of the house, Greg White, inherited it from his mother, who had died on June 28, 2010. White, whose primary residence is in Annapolis, Maryland, went to the house at least once or twice per month after his mother's death. White had stayed at the house overnight on December 17 and 18, 2017, which was just ten days prior to the break in. The house was unoccupied at the time of the break-in. The perpetrator obtained access to the interior of the house by pushing a bedroom window up and climbing through that opening into the bedroom. The house had furniture in the three bedrooms, living room, family room, and kitchen. White had his own sleeping quarters in the house, and he kept food in the pantry, cabinets, and refrigerator. The house had operational utility services, including electricity and water. During the break in, Smith allegedly took food, quilts, blankets, sheets, towels, bathroom supplies, two televisions, and a videocassette recorder from the house.

Two witnesses, Mary Cooper and Stan Davis, who were driving by the house on the night of December 28, 2017, reported seeing a man matching Smith's description walking up the driveway to the house from the nearby road approximately 30 minutes before the break-in took place. They subsequently identified Smith from a photo array at the police station, and they selected him upon viewing a lineup of suspects in which he was included.

Smith has steadfastly denied all involvement in the December 28, 2017 break-in, fervently claiming that it was the work of his twin brother, Jerry. He claims that he could not have participated in the break-in because he was visiting a friend in Phoenix, Arizona at the time. At trial, he took the stand in his own defense, and was subject to cross-examination on both of these claims, ultimately admitting that he had been

visiting his friend in Scottsdale, Arizona rather than Phoenix, as he had claimed earlier. Mary and Stan likewise stated during cross-examination that they had initially reported to police that the person they saw was walking up the driveway to the house and wearing a black coat, but at trial stated that this person was wearing a maroon sweatshirt and admitted that the person could have been walking down the driveway, rather than up the driveway.

(b) Suggested Sequence of Instructions for Hypothetical Breaking & Entering

In addition to Instruction No. 2.050 (Preliminary Instructions to Jury), it is recommended that the following instructions be given in the sequence shown. Each of these instructions appears in this book. Many of them have been adapted from the form in which they appear in the book so that they fit the specific facts of this hypothetical case. If you compare the instructions given here with the model in the body of the book, you can gauge the way in which these instructions can be modified.

The background facts of the hypothetical breaking and entering case set out above suggest that the following model instructions could be appropriate for the merits phase of the case:

Instruction No. 2.100 Reasonable Doubt and Presumption of Innocence

Instruction No. 2.330 Indictment by Grand Jury

Instruction No. 2.110 Identity of Defendant As the Perpetrator

Instruction No. 2.200 Character of Defendant

Instruction No. 2.400 Circumstantial Evidence

Instruction No. 2.500 Credibility of Witnesses

Instruction No. 2.550 Statement of the Defendant

Instruction No. 2.580 Prior Inconsistent Statement of Defendant

Instruction No. 2.560 Prior Inconsistent Statement of Witness

Instruction No. 52.100 Alibi

Instruction No. 12.600 Breaking—Definition

Instruction No. 12.610 Entering—Definition

Instruction No. 12.620 Dwelling House—Definition

Instruction No. 12.100 Common Law Burglary—Unarmed

Instruction No. 2.720 Possible Verdicts

If the jury was to find the defendant guilty, and if the defendant had timely and properly requested to be sentenced by the jury as set forth in Va. Code Ann. § 19.2-295(A), then the following instructions would be appropriate for the punishment phase of the case:

Instruction No. 2.700 Duty of Jury in Fixing Punishment

Instruction No. P12.100 Common Law Burglary—Unarmed

(c) Suggested Text of Instructions for Hypothetical Breaking & Entering

Here, the titles of the instructions are given only for your benefit; and it is recommended that they not be given to the jury. Instructions for the merits phase are presented first, followed by instructions applicable to the punishment phase.

(i) MERITS PHASE

(1) Instruction No. 2.100, Reasonable Doubt and Presumption of Innocence

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been charged and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the crime beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

(2) Instruction No. 2.330, Indictment by Grand Jury

The fact that the defendant has been indicted by a grand jury is not evidence against him, and you should not consider it.

(3) Instruction No. 2.110, Identity of Defendant As the Perpetrator

The Commonwealth bears the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime charged. If the Commonwealth has not met this burden, you shall find the defendant not guilty.

(4) Instruction No. 2.200, Character of Defendant

You may consider the character of the defendant when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence.

(5) Instruction No. 2.400, Circumstantial Evidence

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

(6) Instruction No. 2.500, Credibility of Witnesses

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand,

their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

(7) Instruction No. 2.550, Statement of the Defendant

The statements presented to you as having been made by the defendant are submitted for your consideration along with all the other evidence. The weight, value, credibility and reliability of those statements are questions for your determination.

(8) Instruction No. 2.580, Prior Inconsistent Statement of Defendant

If you believe from the evidence that the defendant previously made a statement inconsistent with his testimony at this trial, that previous statement may be considered by you as proof that what the defendant previously said is true.

(9) Instruction No. 2.560, Prior Inconsistent Statement of Witness

If you believe from the evidence that a witness previously made a statement inconsistent with his testimony at this trial, the only purpose for which that statement may be considered by you is for its bearing on the witness's credibility. It is not evidence that what the witness previously said is true.

(10) Instruction No. 52.100, Alibi

The defendant relies upon the defense that he was not present at the time and place the alleged crime was committed. If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged offense was committed, you shall find him not guilty.

(11) Instruction No. 12.600, Breaking—Definition

Breaking, as used in these instructions, is the use of some force, however slight, to gain entry.

(12) Instruction No. 12.610, Entering—Definition

Entering occurs whenever any part of a person's body comes within the premises.

(13) Instruction No. 12.620, Dwelling House—Definition

A dwelling house is a building used for habitation. Habitation or occupancy includes not only sleeping, but other dwelling-related activities such as preparing and consuming meals, bathing, and other day-to-day activities traditionally associated with habitation. The Commonwealth does not need to prove that the building is inhabited at regular intervals.

(14) Instruction No. 12.100, Common Law Burglary—Unarmed

The defendant is charged with the crime of burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant without permission broke and entered the dwelling house of another; and

(2) That he did so in the nighttime; and

(3) That he did so with the intent to commit larceny.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

(15) Instruction No. 2.720, Possible Verdicts

Under the charge against the defendant, you may return either of the following verdicts, which verdict must be unanimous:

(1) Not guilty; or

(2) Guilty.

(ii) PUNISHMENT PHASE

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A).

(1) Instruction No. G2.700, Duty of Jury in Fixing Punishment

You have found the defendant guilty of burglary. You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.

(2) Instruction No. P12.100, Common Law Burglary—Unarmed

You have found the defendant guilty of the crime of burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

CHAPTER 2

INTRODUCTORY INSTRUCTIONS—GENERAL

Scope Note

Instruction No. 2.050 Preliminary Instructions to Jury

Instruction No. 2.100 Reasonable Doubt and Presumption of Innocence

Instruction No. 2.110 Identity of Defendant As the Perpetrator

Instruction No. 2.150 Failure of Defendant to Testify

Instruction No. 2.200 Character of Defendant

Instruction No. 2.250 Where Previous Conviction of the Same or Similar Crime Is an Element of Offense

Instruction No. 2.260 Prior Crime Evidence, Generally

Instruction No. 2.300 Flight from Scene or Use of False Name to Avoid Prosecution, Detection, Apprehension or Arrest

Instruction No. 2.330 Indictment by Grand Jury

Instruction No. 2.360 Rejected and Stricken Matter

Instruction No. 2.370 Exhibits

Instruction No. 2.400 Circumstantial Evidence

Instruction No. 2.500 Credibility of Witnesses

Instruction No. 2.510 Failure to Record Custodial Interrogation to be Considered in Weighing the Evidence

Instruction No. 2.530 Definition of Proximate Cause

Instruction No. 2.540 Prior Conviction of Felony or Crime Involving Moral Turpitude

Instruction No. 2.550 Statement of the Defendant

Instruction No. 2.560 Prior Inconsistent Statement of Witness

Instruction No. 2.580 Prior Inconsistent Statement of Defendant

Instruction No. 2.700 Duty of Jury in Fixing Punishment

Instruction No. 2.705 Parole

Instruction No. 2.710 Parole—Age

Instruction No. 2.720 Possible Verdicts

Instruction No. 2.740 Form Findings—Felony and Misdemeanor

Instruction No. P2.740 Form Findings—Felony and Misdemeanor

Instruction No. 2.780 Verdict—"Allen Charge"

Instruction No. 2.800 Note on Eyewitness Identification

SCOPE NOTE

This chapter includes some of the principal instructions that will be given in the majority of criminal cases. These instructions cover the general issues that are part of almost every trial, regardless of the substantive offense with which the defendant is charged.

Although most of these instructions are concise and simply worded, they represent principles that are essential to an understanding of a criminal trial; thus, they may have a significant impact on the deliberations of the jury. Therefore, the court, as well as counsel for both the defendant and the Commonwealth, should study these instructions carefully.

There is no instruction included in this chapter that alerts the jury to potential problems associated with eyewitness identification. The Supreme Court of Virginia has not adopted a rule that requires a cautionary instruction on eyewitness identification, nor has it suggested language for such instruction. However, the Court has not held that such an instruction would never be appropriate. *Payne v. Commonwealth, 292 Va. 855, 872, 794 S.E.2d 577, 586 (2016)*; *Daniels v. Commonwealth, 275 Va. 460, 465, 657 S.E.2d 84, 86 (2008)*. A note on eyewitness testimony has been included to assist judges and practitioners in this area. See 2.800 Note on Eyewitness Identification. The suggestions in the note have not been approved by the Court of Appeals of Virginia or the Supreme Court of Virginia.

Instruction No. 2.050

Preliminary Instructions to Jury

Members of the jury, the order of the trial of this case will be in four stages:

1. **Opening statements**
2. **Presentation of the evidence**
3. **Instructions of law**
4. **Final argument**

After the conclusion of final argument, I will instruct you concerning your deliberations. You will then go to your room, select a foreperson, deliberate, and arrive at your verdict.

Opening Statements

First, the Commonwealth's attorney may make an opening statement outlining his or her case. Then the defendant's attorney also may make an opening statement. Neither side is required to do so.

Presentation of the Evidence

[Second, following the opening statements, the Commonwealth will introduce evidence, after which the defendant then has the right to introduce evidence (but is not required to do so). Rebuttal evidence may then be introduced if appropriate.]

[Second, following the opening statements, the evidence will be presented.]

Instructions of Law

Third, at the conclusion of all evidence, I will instruct you on the law which is to be applied to this case.

Final Argument

Once the evidence has been presented and you have been instructed on the law, then the attorneys may make their closing arguments. The Commonwealth's attorney will argue first, the defendant's attorney may reply, and the Commonwealth's attorney may close in rebuttal.

Members of the jury, your function in the trial of this case is to reach a unanimous verdict that is based solely on the evidence and the instructions of law which you will be given after all the evidence has been presented. The law applicable to this case is given to you in these instructions and in the other instructions you will receive at the close of all evidence, and it is your duty to follow all such instructions.

[The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been charged and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the crime beyond a reasonable doubt. This does not require proof beyond all possible

doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.]

[A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.]

No statement or ruling or remark that I may make during the course of the trial is intended to indicate my opinion as to what the facts are. It is the function of the jury to consider the evidence and determine the facts in this case.

The evidence which you are to consider consists of testimony of witnesses, any exhibits admitted into evidence, and any facts agreed upon between the parties and presented to you in the form of a stipulation. The admission of evidence in court is governed by rules of law; and from time to time, it may be the duty of the attorneys to make objections and my duty as judge to rule on those objections and decide whether or not you can consider certain evidence. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken. If an objection is overruled, then you may consider that evidence together with all other evidence in the case. The opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and in applying the law, but their statements are not evidence.

In your determination of what the facts are, you alone must determine the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case. You should not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You should use your common sense in considering the evidence, and you may draw reasonable inferences from that evidence; but in doing so, you should not indulge in guesswork or speculation. From consideration of these things and all the other circumstances of the case, you should determine which witnesses are more believable and weigh their testimony accordingly. Until this case is submitted to you for your deliberations, you should not decide any issue in the case and you should not discuss the case with anyone or remain within hearing of anyone who is discussing it.

There will be occasional recesses during the trial. During the recesses, you should not discuss the case with your fellow jurors nor go to the scene or make any independent investigation or receive any information about the case from radio, television, the Internet, or the newspapers. Once your deliberations commence, then you must discuss the case only in the jury room when all the members of the jury are present.

Do not attempt at any time prior to the conclusion of the case to research any fact, issue, or law related to this case, whether by discussion with others, by

research in a library or on the Internet, or by any other means or source. You must not use Internet maps, or any other program or device to search for and view any location discussed in the testimony. You must not search for any information about the case, or the law which applies to the case, or the people involved in the case, including the parties, the witnesses, the lawyers, or the judge. You must not communicate with anyone about the case by any other means, including by telephone, text messages, e-mail, internet chat or chat rooms, blogs, or social web sites. I expect you will inform me if you become aware of another juror's violation of these instructions.

Just prior to your deliberations, you will be given a final instruction with regard to your selection of a leader, the conduct of your deliberations, and the forms for your verdict.

The faithful and proper performance by you of your duty is vital to the administration of justice. On behalf of the court and the litigants, we appreciate your giving your complete attention to the case as it is presented.

Thank you.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

This instruction was compiled from a number of sources; there is no one case that authorizes this instruction. A variation of this instruction may be found in the Virginia Criminal Benchbook for Judges and Lawyers. Virginia Criminal Benchbook for Judges and Lawyers § Intro.05.

PRACTICE COMMENTARY: Jurors, at least at the start of the term, are usually strangers to the courtroom. Anything the court can do to make them understand what is happening will increase their ability to concentrate on the cases they try. After the jury has been selected and sworn, and before the opening statements of counsel, the jury should be told what its function is and the procedure to be followed in the trial, so that they can concentrate on the evidence as it comes in.

ALERTS:

• Most judges use some form of this instruction with modifications based on local custom and usage and the judge's personal style. This instruction is normally given while the parties are exercising their peremptory strikes and helps to avoid the somewhat awkward situation of counsel and jurors staring at each other as strikes are contemplated and made.

• Language discussing the presumption of the defendant's innocence, the Commonwealth's burden to prove every element of the crime beyond a reasonable doubt, and the rule that mere suspicion of the defendant's guilt, or a probability thereof, is not sufficient to warrant a conviction, as well as the meaning of "reasonable doubt," is sometimes given as part of the overall preliminary instructions to the jury in a criminal case. If that option is desirable as a matter of local custom or usage, the bracketed paragraphs set out above may be included as part of the overall model preliminary instruction. Otherwise, it is appropriate to give the jury a separate instruction on these topics; see Instruction No. 2.100 for a model.

Instruction No. 2.100

Reasonable Doubt and Presumption of Innocence

The defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been charged and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the crime beyond a reasonable doubt. This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However, suspicion or probability of guilt is not enough for a conviction.

There is no burden on the defendant to produce any evidence.

A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

Note:

The second paragraph of the instruction is optional in cases where the defendant produces evidence.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

O'Dell v. Commonwealth, 234 Va. 672, 698–99, 364 S.E.2d 491, 506 (1988).

OTHER RELEVANT DECISIONS:

Cooper v. Commonwealth, 2 Va. App. 497, 500, 345 S.E.2d 775, 777 (1986); Russell v. Commonwealth, 216 Va. 833, 837, 223 S.E.2d 877, 879 (1976); Westry v. Commonwealth, 206 Va. 508, 514, 144 S.E.2d 427, 431 (1965); Strawderman v. Commonwealth, 200 Va. 855, 857–58, 108 S.E.2d 376, 379 (1959); Smith v. Commonwealth, 155 Va. 1111, 1120–21, 156 S.E. 577, 580–81 (1931); McCoy v. Commonwealth, 133 Va. 731, 734–36, 112 S.E. 704, 705–06 (1922); McCue v. Commonwealth, 103 Va. 870, 1001–03, 49 S.E. 623, 629–30 (1905).

PRACTICE COMMENTARY: In *O'Dell,* the Supreme Court of Virginia approved the use of a reasonable doubt instruction identical to this instruction.

Reasonable Doubt Standard. There are no particular words which must be used in advising the jury of the Commonwealth's burden of proof beyond a reasonable doubt. *Commonwealth v. Hudson, 265 Va. 505, 512, 578 S.E.2d 781, 785 (2003),* citing *Victor v. Nebraska, 511 U.S. 1, 5 (1994).* The court has repeatedly discouraged attempts to further reduce or define the concept of reasonable doubt, warning that such attempts usually cloud rather than clarify the issue. *Strawderman, 200 Va. at 857–58, 108 S.E.2d at 379*; and *Smith, 155 Va. at 1120–21, 156 S.E. at 580–81.* See also *McCoy, 133 Va. at 734–36, 112 S.E.at 705–06.* Nonetheless, it is not error to instruct the jury that reasonable doubt must be founded on sound judgment after consideration of all the evidence. However, there must be no additional implication or suggestion that doubt must be created or produced by affirmative proof; reasonable doubt may also arise from lack or want of evidence. *McCue, 103 Va. at 1001–03, 49 S.E. at 629–30.* See also *McCoy, 133 Va. at 734–36, 112 S.E.at 705–06.*

Support for the second paragraph of the instruction can be found in *Russell, 216 Va. at 837, 223 S.E.2d at 879*: "The burden is upon the prosecution to prove its case against the accused. The defense need not prove anything; it may rely upon the presumption of innocence."

☞ ***PRACTICE POINTER:***

This instruction complies with constitutional requirements as expressed in *Victor v. Nebraska, 511 U.S. 1 (1994).*

☞ ***PRACTICE POINTER:***

See also Instruction No. 2.150 regarding failure of the defendant to testify.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after

the required modifications are made to the instruction, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.7, 17.8

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 60.1, 60.4, 62.8

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15[a], 5-5, 5-9

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 51, 53, 54, 62, 66, 69; and Evidence §§ 34, 35, 37, 284

Instruction No. 2.110

Identity of Defendant As the Perpetrator

The Commonwealth bears the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the crime charged. If the Commonwealth has not met this burden, you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Payne v. Commonwealth, 292 Va. 855, 872, 794 S.E.2d 577, 586 (2016); *Cuffee v. Commonwealth, 61 Va. App. 353, 364, 735 S.E.2d 693, 698 (2013)*; *Blevins v. Commonwealth, 40 Va. App. 412, 423, 579 S.E.2d 658, 663 (2003)*; *Brickhouse v. Commonwealth, 208 Va. 533, 536, 159 S.E.2d 611, 613 (1968)*; *Terry v. Commonwealth, 174 Va. 507, 516. 6 S.E.2d 673, 677 (1939).*

PRACTICE COMMENTARY: This instruction should be given if the identity of the perpetrator is an issue.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.7, 17.8

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 45.1

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 53, 54, 55; and Identity § 3

Instruction No. 2.150

Failure of Defendant to Testify

The defendant does not have to testify, and exercise of that right cannot be considered by you.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-268.

PRINCIPAL CASE AUTHORITY:

Quesinberry v. Commonwealth, 241 Va. 364, 376–77, 402 S.E.2d 218, 225–26 (1991).

OTHER RELEVANT DECISIONS:

Dunn v. Commonwealth, 222 Va. 750, 751–53, 284 S.E.2d 807, 808–09 (1981); Hines v. Commonwealth, 217 Va. 905, 906, 911, 234 S.E.2d 262, 263, 266 (1977); Lincoln v. Commonwealth, 217 Va. 370, 371, 228 S.E.2d 688, 689–90 (1976); Joyner v. Commonwealth, 192 Va. 471, 474–75, 65 S.E.2d 555, 557 (1951).

PRACTICE COMMENTARY: In *Quesinberry,* the Supreme Court of Virginia approved the use of a failure to testify instruction identical to this instruction.

Case Discussion. This instruction is a simplified version of the failure to testify instructions noted with approval in *Joyner*, *Lincoln*, and *Hines*. Here is some key language:

- The *Joyner* instruction, *192 Va. at 474–75, 65 S.E.2d at 557*, was: "The court instructs the jury that the failure of the accused to testify creates no presumption against him; and in considering his guilt or innocence, his failure to testify is not a circumstance which the jury is entitled to consider."
- The *Lincoln* instruction, *217 Va. at 371, 228 S.E.2d at 689–90*, was: "[T]he right and privilege of the accused to testify or not to testify and [his] failure [to testify] creates no presumption against him and [his] failure [to testify] is not a circumstance which the jury should consider when arriving at its verdict."
- The *Hines* instruction, *217 Va. at 906, 234 S.E.2d at 263*, was: "Failure of the defendant to testify creates no presumption against him and in considering his innocence or guilt, his failure to testify is not a circumstance which the jury is entitled to consider."

ALERTS:

• A state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to the defendant's failure to testify. The Fifth and Fourteenth Amendments require a trial judge to give a "no adverse inference" jury instruction when requested by a defendant to do so.

> A failure to testify instruction should always be given if requested by a defendant. While the better practice is that it not be given over defendant's objection, there will be cases in which a cautionary instruction may be given by a court in the exercise of its sound discretion and where no prejudice will result.

Hines, 217 Va. at 911, 234 S.E.2d at 266.

• However, "an accused who takes the stand waives his right against self-incrimination in its entirety, not just selectively, and may be cross-examined on any subject related to the offenses for which he is on trial. An accused, by taking the stand, also waives his right not to have the Commonwealth comment on his failure to testify on a particular issue or subject." *Wells v. Commonwealth, 32 Va. App. 775, 786, 531 S.E.2d 16, 21 (2000).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 18.2, 18.5

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 43.1–43.7

MICHIE'S JURISPRUDENCE, Argument and Conduct of Counsel § 9; Constitutional Law § 93; Criminal Procedure §§ 48, 51, 56; and Witnesses §§ 39, 63, 80, 82

Instruction No. 2.200

Character of Defendant

You may consider the character of the defendant when proven by the evidence, whether good or bad, along with the other facts and circumstances in the case in determining his guilt or innocence.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Harper v. Commonwealth, 196 Va. 723, 728, 85 S.E.2d 249, 253 (1955); Owens v. Commonwealth, 186 Va. 689, 708, 43 S.E.2d 895, 903 (1947).

OTHER RELEVANT DECISIONS:

Pughsley v. Commonwealth, 33 Va. App. 640, 647, 536 S.E.2d 447, 450 (2000); Gravely v. Commonwealth, 13 Va. App. 560, 562–63, 414 S.E.2d 190, 191–92 (1992); Chiles v. Commonwealth, 12 Va. App. 698, 699–700, 406 S.E.2d 413, 414–15 (1991).

PRACTICE COMMENTARY: The language of the instruction is based on *Owens, 186 Va. at 708, 43 S.E.2d at 903*, where the court approved the following charge: "The character of a prisoner when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of a prisoner is a matter for the determination of the jury in connection with the other facts proven in the case." This instruction was subsequently approved in *Harper*.

In *Harper*, the Supreme Court of Virginia specified that a proper instruction regarding evidence of a defendant's character should read substantially as set forth in *Owens*.

ALERTS:

• This instruction should not be given unless the defendant has offered character evidence. Once the defendant offers such evidence, it may be given whether or not the Commonwealth offers character evidence in rebuttal. *Robinson v. Commonwealth, 118 Va. 785, 790, 87 S.E 553, 555 (1916). Poole v. Commonwealth, 211 Va. 262, 265, 176 S.E.2d 917, 919 (1970).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 17.33

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 52, 56, 58, 59; Evidence § 50; and Witnesses §§ 64, 65, 66, 67

Instruction No. 2.250

Where Previous Conviction of the Same or Similar Crime Is an Element of Offense

Evidence that the defendant was previously convicted of a similar offense is not proof that he [distributed heroin; drove while under the influence of alcohol, etc.] **on** (date of current offense)**, and such evidence may not be considered by you in determining whether the defendant** [distributed heroin; drove while under the influence of alcohol, etc.] **on** (date of current offense)**.**

Note:

The language in the brackets contains examples of offenses where a previous conviction is an element of the offense. This language must be modified to fit the offense for which the defendant is being tried.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Simpson v. Commonwealth, 199 Va. 549, 555, 100 S.E.2d 701, 705 (1957).

OTHER RELEVANT DECISIONS:

Woodson v. Commonwealth, 16 Va. App. 539, 540–41, 431 S.E.2d 82, 83–84 (1993); Brown v. Commonwealth, 226 Va. 56, 59, 307 S.E.2d 239, 240 (1983); Calfee v. Commonwealth, 215 Va. 253, 255, 208 S.E.2d 740, 742 (1974).

PRACTICE COMMENTARY: This limiting instruction is designed to be used only when the defendant is charged as a repeat offender and proof of a prior conviction is admitted for the purpose of enhancing punishment if the defendant is convicted of the current offense. *Brown, 226 Va. at 59, 307 S.E.2d at 240.*

Other Crimes Instruction. In *Simpson, 199 Va. at 555, 100 S.E.2d at 705*, the court instructed the jury that "the fact that the defendant has been heretofore convicted of a like offense is not proof that he is guilty of the offense here charged and such fact should not be considered by the jury in reaching a conclusion as to his guilt or innocence on the present charge." *Simpson* involved enhanced punishment for subsequent convictions of illegal sale of alcoholic beverages. *Simpson, 199 Va. at 554.*

☞ ***PRACTICE POINTER:***

For an instruction on the effect of prior conviction of crime on credibility, see Instruction No. 2.540. For a limiting instruction where evidence of prior offenses is relevant for other purposes, see Instruction No. 2.260.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 17.34

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-4, 8-4A, 12-4, 12-9, 12-10

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 52, 56, 58, 59; Evidence § 50; and Witnesses §§ 64, 65, 66, 67

Instruction No. 2.260

Prior Crime Evidence, Generally

You may consider evidence that the defendant committed a crime other than the crime for which he is on trial only [as evidence of the defendant's motive; as evidence of the defendant's intent; as evidence of the defendant's scheme or plan; as evidence of the defendant's identity; as evidence of the defendant's knowledge; as evidence of the defendant's conduct and feelings toward the victim and relations between them; as evidence of the defendant's malice; as evidence of the defendant's premeditation; as evidence of the defendant's opportunity; as evidence of the absence of mistake or accident on the part of the defendant; as evidence to negate the defense that the defendant was merely an innocent bystander; as evidence of the unique nature of the method of committing the crime charged; if prior conviction of that crime is an element that must be proven] **in connection with the crime for which he is on trial and for no other purpose**.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Brown v. Commonwealth, 18 Va. App. 150, 151–52, 442 S.E.2d 421, 422–23 (1994); Kelly v. Commonwealth, 8 Va. App. 359, 382 S.E.2d 270 (1989); Kirkpatrick v. Commonwealth, 211 Va. 269, 176 S.E.2d 802 (1970).

OTHER RELEVANT DECISIONS:

McGowan v. Commonwealth, 274 Va. 689, 652 S.E.2d 103 (2007); Scates v. Commonwealth, 262 Va. 757, 761, 553 S.E.2d 756, 758–59 (2001); Quinones v. Commonwealth, 35 Va. App. 634, 640, 547 S.E.2d 524, 527 (2001); Johnson v. Commonwealth, 259 Va. 654, 676–77, 529 S.E.2d 769, 782 (2000); Burley v. Commonwealth, 29 Va. App. 140, 144, 510 S.E.2d 265, 267 (1999); Boney v. Commonwealth, 29 Va. App. 795, 800–01, 514 S.E.2d 810, 812–13 (1999); Utz v. Commonwealth, 28 Va. App. 411, 420–21, 505 S.E.2d 380, 385 (1998); Hackney v. Commonwealth, 28 Va. App. 288, 293, 504 S.E.2d 385, 388 (1998); Bullock v. Commonwealth, 27 Va. App. 255, 260–61, 498 S.E.2d 433, 435 (1998); Pavlick v. Commonwealth, 27 Va. App. 219, 225–26, 497 S.E.2d 920, 923 (1998); Blaylock v. Commonwealth, 26 Va. App. 579, 588–89, 496 S.E.2d 97, 101–02 (1998); Guill v. Commonwealth, 255 Va. 134, 138–39, 495 S.E.2d 489, 491 (1998); Chichester v. Commonwealth, 248 Va. 311, 326, 448 S.E.2d 638, 648 (1994); Copeland v. Commonwealth, 13 Va. App. 450, 412 S.E.2d 468 (1991); Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990); Callahan v. Commonwealth, 8 Va. App. 135, 379 S.E.2d 476 (1989); Foster v. Commonwealth, 6 Va. App. 313, 369 S.E.2d 688 (1988); Marshall v. Commonwealth, 5 Va. App. 248, 361 S.E.2d 634 (1987).

PRACTICE COMMENTARY: This limiting instruction is designed to be used only when proof of a prior offense is relevant to prove an element or circumstance of the current offense.

In *Brown*, the Court of Appeals stated that "[a] cautionary instruction regarding evidence of other crimes is a valuable, if not necessary, means of properly limiting a jury's consideration of such evidence," and further noted that "[o]ften it may also demonstrate the propriety or impropriety of admitting the evidence."

General Rule of Exclusion. Evidence that shows or tends to show that a defendant committed other crimes is not admissible to show that the defendant committed the crime charged. *Wilson v. Commonwealth, 16 Va. App. 213, 429 S.E.2d 229, aff'd en banc, 17 Va. App. 248, 436 S.E.2d 193 (1993).* See also the decision in *Brown* on this point.

Exceptions to General Rule of Exclusion. Evidence of other crimes will be admitted if it shows the conduct and feelings of the accused toward the victim, establishes their prior relationship, or tends to prove any relevant element of the offense charged. *Kirkpatrick, 211 Va. at 272, 176 S.E.2d at 805*; *Foster, 6 Va. App. at 323, 360 S.E.2d at 694.* Such evidence may also be admissible to prove a

defendant's motive, intent, or knowledge, or when the evidence of other crimes is connected with, or leads up to, the offenses for which the defendant is being tried. *Kirkpatrick, 211 Va. at 272, 176 S.E.2d at 805*. Likewise, "evidence of other crimes" may be admissible to prove identity. *Chichester, 248 Va. at 326, 448 S.E.2d at 648*. The court must properly instruct the jury of the limited purpose for which the evidence can be considered. *Callahan, 8 Va. App. at 141–42, 379 S.E.2d at 480*; *Kelly, 8 Va. App. at 371, 382 S.E.2d at 276*.

The limiting instruction approved in *Kelly* provided:

> The Court instructs the jury that any evidence of prior offenses which may have been committed against the victim by the accused are not to be considered by you as indicating that it is likely the defendant is guilty of the offense for which he is on trial simply because of the nature of any such conduct toward the victim but may be considered with respect to the offense for which the accused is currently on trial only as such evidence may bear upon the questions of malice, motive and intent."

8 Va. App. at 371 n.5, 393 S.E.2d at 277 n.5.

☞ ***PRACTICE POINTER:***

Evidence of other crimes offered to establish the identity of a perpetrator through a distinctive *modus operandi* need not bear such an exact resemblance to the crime on trial as to constitute a "signature." Rather, it is sufficient if the other crimes bear "a singular strong resemblance to the pattern of the offense charged," thus tending to establish the probability of a common perpetrator. *Spencer, 240 Va. at 90, 393 S.E.2d at 616*, citing *United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989)* (quoting *United States v. Shackleford, 738 F.2d 776, 783 (7th Cir. 1984)*).

☞ ***PRACTICE POINTER:***

If the defendant is charged as a repeat offender and proof of a prior conviction is used for that purpose, Instruction No. 2.250 is the limiting instruction that should be used.

This instruction would be appropriate for use when Instruction 18.620 (possession of a firearm, etc. by a felon) and/or Instruction 18.625 (carrying a concealed weapon after being convicted of a felony) are given.

ALERTS:

• ***Prerequisites to Use of This Proof.*** Admissibility of evidence to establish intent requires "a causal relation or logical or natural connection between the two acts or they . . . form parts of one transaction" with sufficient probative value to overcome the incidental prejudice to the accused. *Barber v. Commonwealth, 182 Va. 858, 866, 30 S.E.2d 565, 568 (1944)*. See generally the full discussion in *Guill*; see also the application of these doctrines in *Boney*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 17.34

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-4, 8-4A, 12-4,

12-9, 12-10

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 52, 56, 58, 59; Evidence § 50; and Witnesses §§ 64, 65, 66, 67

Instruction No. 2.300

Flight from Scene or Use of False Name to Avoid Prosecution, Detection, Apprehension or Arrest

If a person [leaves the place where a crime was committed to avoid prosecution, detection, apprehension or arrest; flees to avoid prosecution, detection, apprehension or arrest; intentionally assumes a false name immediately after the commission of a crime], **this creates no presumption that the person is guilty of having committed the crime. However, it is a circumstance which you may consider along with the other evidence.**

Sources & Authority

Governing Statute:

None.

Principal Case Authority:

Turman v. Commonwealth, 276 Va. 558, 564–67, 667 S.E.2d 767, 770–71 (2008); *Edmondson v. Commonwealth, 248 Va. 388, 389–91, 448 S.E.2d 635, 636–37 (1994).*

Other Relevant Decisions:

Thomas v. Commonwealth, 279 Va. 131, 166–67, 688 S.E.2d 220, 239–40 (2010); Lovitt v. Commonwealth, 260 Va. 497, 512–13, 537 S.E.2d 866, 876–77 (2000); Graves v. Commonwealth, 65 Va. App. 702, 780 S.E.2d 904 (2016); Woolridge v. Commonwealth, 29 Va. App. 339, 348–49, 512 S.E.2d 153, 157–58 (1999); Utz v. Commonwealth, 28 Va. App. 411, 415, 505 S.E.2d 380, 382 (1998); Schlimme v. Commonwealth, 16 Va. App. 15, 18, 427 S.E.2d 431, 433 (1993); Langhorne v. Commonwealth, 13 Va. App. 97, 101–02, 409 S.E.2d 476, 477 (1991). Carson v. Commonwealth, 188 Va. 398, 408–09, 49 S.E.2d 704, 708–09 (1948); Jenkins v. Commonwealth, 132 Va. 692, 694–95, 111 S.E. 101, 102 (1922).

Practice Commentary: In *Edmonson*, the Supreme Court of Virginia approved the use of an instruction similar to the model instruction, explaining that "[i]nstructions allowing the jury to consider flight as an action tending to show guilt are not considered to be improper comments on the evidence," and that such instructions "are given routinely by the courts of this Commonwealth with the approval of this Court." *Edmonson, 248 Va. at 389–91, 448 S.E.2d at 636–37.*

In *Turman*, the Supreme Court of Virginia held that the phrase "if a person leaves the place where a crime was committed" rendered the former model instruction an incorrect statement of law, because almost every person who commits a crime and is not apprehended at the scene will leave the place where the crime was committed. *Turman v. Commonwealth, 276 Va. 558, 566, 667 S.E.2d 767, 771 (2008).* The current instruction corrects the problem identified in *Turman* by adding "to avoid prosecution, detection, apprehension, or arrest" to the end of the offending phrase. The jury is thus instructed on the defendant's motive or reason for his flight so that the jury will not infer that a person has consciousness of guilt merely because that person left a place where a crime was committed. *See id.*

No Presumption of Guilt. In *Jenkins*, the Court specifically rejected the proposition that the flight of the accused from the scene of the crime raises a presumption of guilt. Rather, the court said the flight was "merely evidence tending to show guilt, to be considered by the jury and given such weight as they deem proper in connection with other pertinent and material facts and circumstances in the case." *Jenkins, 132 Va. at 694–95, 111 S.E. at 102. Jenkins* was followed in *Carson*, where the Court commented that the jury may be instructed that flight is "an element, a circumstance which they may take into consideration along with

other facts and circumstances tending to establish guilt or innocence." *Carson, 188 Va. at 408, 49 S.E.2d at 708.*

ALERTS:

• Merely leaving the place where the crime was committed is not a sufficient circumstance to support giving this instruction. *Turman, 276 Va. at 564–67, 248 S.E.2d at 770–71.*

• The instruction is appropriate when addressing flight that occurs *after* the commission of a crime; it should not be given when flight is an element of the charged offense. *See Graves, 65 Va. App. at 709–10, 780 S.E.2d at 907–08.* In *Graves*, the Court of Appeals held that the trial court erred in giving the flight instruction at the defendant's trial for felony eluding the police. The Court determined that in the context of the trial of that charge, the instruction likely was confusing and improperly singled out for emphasis part of the evidence tending to establish a particular fact. The Court, however, determined that the error was harmless in that case. *Id. at 711–13, 780 S.E.2d at 908–09.*

PRACTICE POINTER:

Use of a false name immediately after the commission of a crime is treated as evidence of guilt. *Edmondson, 248 Va. at 390, 248 S.E.2d at 638.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 18.3

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.6, 36.7, 42.5

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-15[d], 7-6

MICHIE'S JURISPRUDENCE, Criminal Procedure § 57

Instruction No. 2.330

Indictment by Grand Jury

The fact that the defendant has been indicted by a grand jury is not evidence against him, and you should not consider it.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Mackall v. Commonwealth, 236 Va. 240, 254, 372 S.E.2d 759, 768 (1988); Swift v. Commonwealth, 199 Va. 420, 425, 100 S.E.2d 9, 13 (1957).

PRACTICE COMMENTARY: In *Swift, 199 Va. at 425, 100 S.E.2d at 13*, the Court said: "It is elementary that the issuance of a warrant or the return of an indictment by a grand jury is not evidence of the guilt of the accused."

In *Mackall, 236 Va. at 254, 372 S.E.2d at 768*, the Supreme Court of Virginia held that an instruction telling jurors that they "should not assume that the defendant is guilty because he has been indicted and is on trial" was proper because it "correctly covered the subject of the effect of the indictment."

ALERTS:

None.

Instruction No. 2.360

Rejected and Stricken Matter

You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Jordan v. Taylor,209 Va. 43, 49, 161 S.E.2d 790, 794 (1968).

PRACTICE COMMENTARY: This instruction enables the court to correct any errors regarding inadmissible evidence. The language of this model instruction is identical to that given in civil cases. See Virginia Model Jury Instructions—Civil, Instruction No. 2.170 (Rejected and Stricken Evidence). For a discussion of other cases pertaining to this instruction in civil litigation, see the Sources & Authority statement to Virginia Model Jury Instructions—Civil, Instruction No. 2.170.

ALERTS:

• A more specific peremptory instruction than this one may be necessary where it is possible that the jury will speculate over an illusory issue. For example, in *Jordan* the only evidence of intoxication was a trooper's testimony that two hours after the accident the defendant had a "beerish type of alcohol" smell about his person. The trial judge instructed the jury "there is no evidence of intoxication or use of alcohol by the defendant, George Edward Jordan, and you shall not consider same in arriving at your verdict." *209 Va. at 49, 161 S.E.2d at 794.*

Instruction No. 2.370

Exhibits

Upon your request, any exhibits introduced into evidence may be sent to the jury room [or otherwise made available] **to be considered in your deliberations.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 8.01-381.

CASE AUTHORITY:

Pugliese v. Commonwealth, 16 Va. App. 82, 90, 428 S.E.2d 16, 23 (1993).

PRACTICE COMMENTARY: Upon request of any party, the court shall instruct the jury that they may request exhibits for use during deliberations. Va. Code Ann. § 8.01-381.

ALERTS:

None.

Instruction No. 2.400

Circumstantial Evidence

It is not necessary that each element of the offense be proved by direct evidence, for an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone, or on circumstantial evidence combined with other evidence, if you believe from all the evidence that the defendant is guilty beyond a reasonable doubt.

When the Commonwealth relies upon circumstantial evidence, the circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt, however strong, or even a probability of guilt.

The evidence as a whole must exclude every reasonable theory of innocence.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Commonwealth v. Hudson, 265 Va. 505, 512–13, 578 S.E.2d 781, 785 (2003); Patler v. Commonwealth, 211 Va. 448, 457, 177 S.E.2d 618, 624 (1970); Webb v. Commonwealth, 204 Va. 24, 34, 129 S.E.2d 22, 29–30 (1963).

OTHER RELEVANT DECISIONS:

Taylor v. Commonwealth, 61 Va. App. 13, 30, 733 S.E.2d 129, 138 (2012; Haskins v. Commonwealth, 44 Va. App. 1, 6, 602 S.E.2d 402, 404 (2004); Emerson v. Commonwealth, 43 Va. App. 263, 277, 597 S.E. 2d 242, 249 (2004); Myers v. Commonwealth, 43 Va. App. 113, 120, 596 S.E.2d 536, 539 (2004); Herrel v. Commonwealth, 28 Va. App. 579, 586–87, 507 S.E.2d 633, 637 (1998); Patrick v. Commonwealth, 27 Va. App. 655, 662, 500 S.E.2d 839, 843 (1998); Cantrell v. Commonwealth, 7 Va. App. 269, 289–90, 373 S.E.2d 328, 338–39 (1988); Johnson v. Commonwealth, 2 Va. App. 598, 604–05, 347 S.E.2d 163, 167 (1986); Beck v. Commonwealth, 2 Va. App. 170, 175–76, 342 S.E.2d 642, 645 (1986).

PRACTICE COMMENTARY:

As set out in *Webb, 204 Va. at 34, 129 S.E.2d at 29-30*:

> All necessary circumstances proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the evidence create a suspicion of guilt, however strong, or even a probability of guilt, but must exclude every reasonable hypothesis save that of guilt.

See also *Patler*:

> Where the proof relied on by the Commonwealth is largely circumstantial, . . . then to establish guilt beyond a reasonable doubt all necessary circumstances must be consistent with guilt and inconsistent with innocence. They must overcome the presumption of innocence and exclude all reasonable conclusions inconsistent with that of guilt. . . . [W]hat inferences are to be drawn from proved facts is within the province of the jury . . . so long as the inferences are reasonable and justified

In *Hudson*, the Supreme Court of Virginia stated that the instruction regarding circumstantial evidence given by the trial court, which featured language identical to the last two paragraphs of the model instruction, "properly paraphrase[d the pertinent] case law," and that "the instruction, properly understood, does not add to the burden of proof placed upon the Commonwealth in a criminal case." *265 Va. at 513, 578 S.E.2d at 785.*

The use of circumstantial evidence has limits: "In order for inferences to amount to evidence they must be inferences based on facts that are proved, and not inferences based on other inferences." *Smith v. Commonwealth, 247 Va. 157, 159, 439 S.E.2d 409, 411 (1994).*

Circumstantial evidence is "proof of a series of other facts than the fact in issue, which by experience have been found so associated with that fact, that, in the relation of cause and effect, they lead to a satisfactory and certain conclusion." *Ryan v. Maryland Cas. Co., 173 Va. 57, 62, 3 S.E.2d 416, 418 (1939).*

Direct evidence is proof (testimony, documents, etc.) that "is offered to prove as a fact the point in issue." *Hudson, 265 Va. at 512, 578 S.E.2d at 785.* Circumstantial evidence, by contrast, "is offered to prove a fact not directly in issue, from which a fact in issue may reasonably be inferred." *Id.* There is no distinction in the law between the weight or value to be given to either direct or circumstantial evidence. The finder of fact is entitled to consider all of the evidence, without distinction, in reaching its determination. *Id. at 512-13, 578 S.E.2d at 785.*

☞ ***PRACTICE POINTER:***

For a discussion of additional cases discussing circumstantial evidence, see the Sources & Authority statement for Virginia Model Jury Instructions—Civil, Instruction No. 2.100 (Circumstantial Evidence).

ALERTS:

• On authority of *Johnson*, the instruction no longer states that circumstantial evidence should be considered "with caution." *2 Va. App. at 604–605, 347 S.E.2d at 167.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 17.7

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 60.1, 60.5, 62.8

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 1-3[c], 7-1 through 7-14

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 53, 62; and Evidence §§ 35, 40, 41, 284

Instruction No. 2.500

Credibility of Witnesses

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 8.01-403 (prior inconsistent statement; limiting instruction).

PRINCIPAL CASE AUTHORITY:

Commonwealth v. McNeal, 282 Va. 16, 21–22, 710 S.E.2d 733, 735–36 (2011); Zirkle v. Commonwealth, 189 Va. 862, 870, 55 S.E.2d 24, 29 (1949); Wright v. Commonwealth, 109 Va. 847, 850–51, 858, 65 S.E. 19, 20, 23 (1909).

OTHER RELEVANT DECISIONS:

Welshman v. Commonwealth, 28 Va. App. 20, 36, 502 S.E.2d 122, 130 (1998); Marable v. Commonwealth, 27 Va. App. 505, 509–10, 500 S.E.2d 233, 235 (1998); Royal v. Commonwealth, 234 Va. 403, 405–06, 362 S.E.2d 323, 324 (1987); Hall v. Commonwealth, 233 Va. 369, 374–76, 355 S.E.2d 591, 594–96 (1987); Manetta v. Commonwealth, 231 Va. 123, 128, 340 S.E.2d 828, 830 (1986); Roberts v. Commonwealth, 230 Va. 264, 269, 337 S.E.2d 255, 258–59 (1985); Coppola v. Commonwealth, 220 Va. 243, 252, 257 S.E.2d 797, 803 (1979); Johnson v. Commonwealth, 142 Va. 639, 640, 128 S.E. 456, 456 (1925).

PRACTICE COMMENTARY: The credibility of witnesses and the weight accorded their testimony has long been recognized as a matter that is solely for the jury. See *Coppola, 220 Va. at 252, 257 S.E.2d at 803*; *Zirkle, 189 Va. at 870, 55 S.E.2d at 29*; *Johnson, 142 Va. at 640, 128 S.E. at 456*. In *Hopkins v. Commonwealth, 230 Va. 280, 337 S.E.2d 264 (1985)*, a cautionary instruction was approved where the Commonwealth's witness was hypnotized before trial.

The language appearing in the first and last paragraphs of the model instruction are based on *Wright* and *Zirkle*. The language appearing in the second paragraph is based on the statement, approved by the Supreme Court of Virginia in *Wright*, that "the jury . . . [has] no right to arbitrarily disregard the testimony of any witness."

In *Wright*, the Supreme Court of Virginia concluded that the following instruction, along with 13 other instructions given in a first degree murder prosecution, "fully and fairly stated the law of the case, both from the standpoint of the Commonwealth and of the accused:"

> The court tells the jury that they are the exclusive judges of the credibility of the witnesses, and the weight to be given their testimony, but that they have no right to arbitrarily disregard the testimony of any witness; but in determining the credibility of witnesses, and the weight to be given their testimony, the jury must take into consideration the interest of the witness in the thing about which he testifies, his means of knowledge, bias, and prejudice in regard to the thing, about which he testifies and his demeanor while testifying. And, when the jury [has] considered the testimony of witnesses according to these principles, they should give to the testimony of each witness all the weight to which his testimony is entitled, if any.

109 Va. at 850–51, 858, 65 S.E. at 20, 23.

In *McNeal*, the Supreme Court of Virginia held that "a fact finder's evaluations of credibility are not limited to choosing between competing accounts offered by different witnesses," but also include "resolving conflicts in a single witness' testimony, accepting that part of the testimony it deems credible and rejecting the portion it deems incredible." *282 Va. at 22, 710 S.E.2d at 736.*

☞ ***PRACTICE POINTER:***

Where prior inconsistent statements have been used to impeach a witness, upon request, a separate instruction that the statements are not evidence of their truth is required. See generally the decisions in *Hall* and *Royal.*

ALERTS:

• In cases where it is an admitted or uncontroverted fact that a witness has testified untruthfully, see *Zirkle, 189 Va. at 870, 55 S.E.2d at 29.*

• Depending on the particular facts of a case in which the accuracy of an eyewitness identification is central to the prosecution's case, this instruction in conjunction with Instruction No. 2.110 may be sufficient to inform the jury on the issue. *Payne v. Commonwealth, 292 Va. 855, 870–72, 794 S.E.2d 577, 585–86 (2016).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.12, 17.14

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 47.1

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Evidence §§ 47, 48, 50, 52–54; and Witnesses §§ 64–67, 71–73

Instruction No. 2.510 Failure to Record Custodial Interrogation to be Considered in Weighing the Evidence

The failure of law enforcement to record a custodial interrogation that occurred at a place of detention is a circumstance you may consider, along with other evidence, in determining the weight you give to statements made by the defendant.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-390.04.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 19.2-390.04 requires, subject to exceptions, law enforcement to record custodial interrogations, but it applies only to "custodial interrogations" that occur in a "place of interrogation." The terms "custodial interrogation" and "place of detention" are defined by statute, as noted below. In addition, the statute contains a number of exceptions, detailed below, that render the recording requirement inapplicable. The statute contains additional requirements for the storage of such recordings.

Requirement that Law Enforcement Record Custodial Detentions at a Place of Detention

Va. Code Ann. § 19.2-390.04(B) provides that

> A law-enforcement officer conducting a custodial interrogation of any person at a place of detention shall cause an audiovisual recording of the entirety of such custodial interrogation to be made. If such law-enforcement officer is unable to cause an audiovisual recording of such custodial interrogation to be made, the law-enforcement officer shall cause an audio recording of such custodial interrogation to be made.

Definitions

Va. Code Ann. § 19.2-390.04(A) defines "custodial interrogation" as

> . . . any interview conducted by a law-enforcement officer in such circumstances that would lead a reasonable person to consider himself to be in custody associated with arrest and during which the law-enforcement officer takes actions or asks questions that are reasonably likely to elicit responses from the person that could incriminate him.

Va. Code Ann. § 19.2-390.04(A) further defines "Place of detention" as ". . . a police station, sheriff's office, jail, detention center, or other similar facility in which suspects may be detained." Va. Code Ann. § 19.2-390.04 (A).

Failure to Record Does not Affect Admissibility

"The failure of a law-enforcement officer to cause an audiovisual or audio recording to be made in accordance with subsection B shall not affect the admissibility of the statements made by the subject of the custodial interrogation . . ." Va. Code Ann. § 19.2-390.04(C).

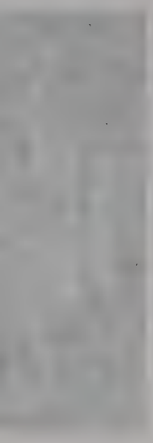
Failure to record may Be Considered in Weighing the Evidence

The failure to record a custodial interrogation at a place of detention "may be considered in determining the weight given to such evidence." Va. Code Ann.

§ 19.2-390.04(C).

***ALERTS*:**

The recording obligation does not apply—and this instruction should not be given—when ". . . a law-enforcement officer conducting a custodial interrogation has good cause not to record such custodial interrogation." Va. Code Ann. § 19.2-390.04(B). The statute defines "good cause" as including ". . . those circumstances where (i) the recording equipment fails, (ii) the recording equipment is unavailable, or (iii) exigent circumstances relating to public safety exist that prevent the recording of such custodial interrogation." *Id.*



Instruction No. 2.530

Definition of Proximate Cause

A proximate cause of an accident, injury, or damage is a cause that, in natural and continuous sequence, produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Davis v. Commonwealth, 57 Va. App. 446, 462, 703 S.E.2d 259, 266–67 (2011); *Brown v. Commonwealth, 278 Va. 523, 529–30, 685 S.E.2d 43, 46–47 (2009)*; *Robinson v. Commonwealth, 274 Va. 45, 52–53, 645 S.E.2d 470, 473–74 (2007)*; *Gallimore v. Commonwealth, 246 Va. 441, 447, 436 S.E.2d 421, 425 (1993).*

PRACTICE COMMENTARY: The principles of proximate causation are applicable in both civil and criminal cases. See *Robinson, 274 Va. at 52–53, 645 S.E.2d at 473–74*; *Gallimore, 246 Va. at 447, 436 S.E.2d at 425.*

There can be more than one proximate cause to an incident, and criminal liability will attach to each person whose wrongful actions cause the harm. *Davis, 57 Va. App. at 462, 703 S.E.2d at 266–67.*

A defendant in an involuntary manslaughter case is not relieved of criminal responsibility by an intervening cause when his actions put into motion the high-speed chase that lead to a third party's death by a police officer's vehicle. *Brown, 278 Va. at 529–30, 685 S.E.2d at 46–47.*

Medical treatment is not a superseding cause if the need for the treatment was put into operation by the defendant's wrongful act or omission. *Levenson v Commonwealth, 68 Va. App. 255, 260–62, 808 S.E.2d. 196, 199–200 (2017).*

PRACTICE POINTER:

See Civil Instruction No. 5.000—Definition of Proximate Cause for discussion of proximate cause in civil actions.

ALERTS:

None.

RESEARCH REFERENCES:

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 34.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories § 3

Instruction No. 2.540

Prior Conviction of Felony or Crime Involving Moral Turpitude

You may consider proof of the [witness's; defendant's] **prior conviction of a** [felony; crime involving moral turpitude] **as affecting his credibility, but it does not render him incompetent to testify nor shall you consider it as evidence of his guilt of the offense for which he is on trial** [nor shall you consider it in fixing punishment if you do find him guilty].

Note:

When the instruction is given in connection with a witness's prior conviction, a period should be inserted after the word "testify" and the remainder of the instruction omitted. If the offense charged is a misdemeanor, add the bracketed language at the end of the instruction.

This instruction applies where defendant has testified and the prior conviction is admitted, for either impeachment or credibility purposes only. If the defendant is charged as a repeat offender and the prior conviction is a similar offense, a period should be inserted after the word "testify" and Instruction No. 2.250 should be substituted for the remainder of this instruction.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-269.

PRINCIPAL CASE AUTHORITY:

Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976); Santmier v. Commonwealth, 217 Va. 318, 320, 228 S.E.2d 681, 682 (1976).

OTHER RELEVANT DECISIONS:

Joyner v. Commonwealth, 10 Va. App. 290, 294, 392 S.E.2d 822, 824 (1990); Chrisman v. Commonwealth, 3 Va. App. 89, 93, 348 S.E.2d 399, 401 (1986); McAmis v. Commonwealth, 225 Va. 419, 304 S.E.2d 2 (1983); Sadoski v. Commonwealth, 219 Va. 1069, 1070, 254 S.E.2d 100, 100–01 (1979); Whittaker v. Commonwealth, 217 Va. 966, 967, 234 S.E.2d 79, 81 (1977); Hummel v. Commonwealth, 217 Va. 548, 550–51, 231 S.E.2d 216, 217 (1977); Harmon v. Commonwealth, 212 Va. 442, 445–46, 185 S.E.2d 48, 51 (1971).

PRACTICE COMMENTARY: Prior to the adoption of Va. Code Ann. § 19.2-269, a witness who had been convicted of a felony or a crime involving moral turpitude was prohibited from testifying unless he was pardoned or punished. While a person convicted of such an offense can now testify because of the statute, his prior conviction can be used to impeach his testimony. See generally the decision in *Lincoln*. The court has a duty, however, to instruct the jury "of the restricted purpose for which the evidence is admitted." *Bland v. Commonwealth, 177 Va. 819, 823, 13 S.E.2d 317, 318 (1941).*

In *Lincoln*, the Supreme Court of Virginia concluded that a defense instruction guiding the jury as to the weighing of the evidence of a prior conviction and as to the credibility of witnesses, which also featured language similar to that of the model instruction, "was a correct statement of the legal principles involved" and that "the trial court, in its discretion, could properly have given the instruction." *Lincoln, 217 Va. at 374–75, 228 S.E.2d at 691–92*. However, the Court held that it was not reversible error for the trial court to refuse to give this instruction under the facts of that case, where the other instructions given "fully and fairly covered principles of law to be followed [by the jury] in weighing the evidence and determining the credibility of the witnesses." *217 Va. at 375, 228 S.E.2d at 692*.

In *Santmier*, the Supreme Court of Virginia held that a trial court was correct in instructing jurors that "[a] defendant's prior . . . conviction was not to be considered by them to determine whether [he] was guilty of the crime for which he was then being tried, but solely for the purpose of impeaching [his] credibility." *217 Va. at 320, 228 S.E.2d at 682*.

PRACTICE POINTER:

A witness's juvenile record may not be used to impeach his credibility. *Bostic v.*

Commonwealth, 31 Va. App. 632, 634–36, 525 S.E.2d 67, 67–68 (2000).

☞ ***PRACTICE POINTER:***

The Supreme Court of Virginia has held that, in addition to showing convictions for "felony or perjury," the credibility of a witness may also be attacked by showing that he or she has been convicted of a misdemeanor involving moral turpitude or affecting the witness's character for veracity. A crime involves moral turpitude only if it is *crimen falsi*—involving deception, trickery, forgery, lying, cheating, or stealing. *Chrisman v. Commonwealth, 3 Va. App. 89, 97, 348 S.E.2d 399, 403 (1986).* Moral turpitude is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Tasker v. Commonwealth, 202 Va. 1019, 1024, 121 S.E.2d 459, 463 (1961).* See also *Parr v. Commonwealth, 198 Va. 721, 723-26, 96 S.E.2d 160, 163-64 (1957).* The only misdemeanors which the Supreme Court of Virginia has said involve moral turpitude are making a false statement and petit larceny. *Chesapeake & Ohio Railway Co. v. Hanes, 196 Va. 806, 86 S.E.2d 122 (1955)* (false statement); *Bell v. Commonwealth, 167 Va. 526, 189 S.E. 441 (1937)* (petit larceny). Indecent exposure is not a crime of moral turpitude for this purpose, since it does not relate to veracity. *Chrisman, 3 Va. App. at 100, 348 S.E.2d at 405.* A misdemeanor involving distribution of marijuana is not a crime of moral turpitude, and therefore may not be shown to impeach. *Newton v. Commonwealth, 29 Va. App. 433, 448, 512 S.E.2d 846, 853 (1999).* In addition, charges not involving a conviction are inadmissible for impeachment purposes. *Id.*

☞ ***PRACTICE POINTER:***

For a discussion of additional cases supporting the language of this model instruction, see the Sources & Authority statement for Virginia Model Jury Instructions—Civil, Instruction No. 2.140 (Prior Conviction of Felony or Crime Involving Moral Turpitude).

ALERTS:

• ***Scope of cross-examination.*** The scope of cross-examination permissible to impeach witness testimony depends on whether or not the defendant is the witness. In *Sadoski* the court said:

> We hold that the Commonwealth may ask a defendant who testifies in a criminal proceeding the number of times he has been convicted of a felony, but, consistent with our ruling in *Harmon*, not the names of the felonies, other than perjury, and not the nature or the details thereof. Thus, a defendant in a criminal trial who has been convicted of one or more felonies is not subject to as comprehensive cross-examination as non-defendant witnesses, notwithstanding the provisions of Va. Code Ann. § 19.2-268.

219 Va. at 1071, 254 S.E.2d at 101.

Sadoski casts doubt on the continuing validity of *Santmier*, where a defendant who testified on his own behalf admitted that he had been previously convicted of

an offense involving marijuana. This admission came after he had already denied using drugs of any kind. On appeal, he argued that it was error to allow the Commonwealth to question him about the specific details of his prior conviction. The Court rejected this argument, however, and asserted that it was permissible to question the defendant about the nature of the prior felony because the conviction was material to an attack on his credibility. The information was material because it demonstrated that the defendant had been untruthful when, at his trial, he originally denied any prior involvement with drugs. *217 Va. at 319–20, 228 S.E.2d at 682.*

In *McAmis*, the Supreme Court expanded upon its statement in *Sadoski* and, in doing so, reaffirmed that case, holding:

> [W]here a defendant takes the witness stand in his own defense and testifies on direct examination that he has been convicted previously of a certain number of felonies, he may be cross-examined only with respect to the correctness of the number stated and, if his answers are truthful, not with regard to the names or the nature of the offenses. Of course, if a prior conviction is for perjury, that offense may always be named. And, if a defendant on direct examination goes beyond merely testifying he has been convicted previously of a certain number of felonies and discloses additional information concerning his convictions, he may be held to have opened the door to inquiry concerning the names of the offenses.

225 Va. at 422, 304 S.E.2d at 4.

Hummel deals with impeachment of witnesses other than the defendant. The witness in *Hummel* testified on behalf of the Commonwealth, and the Court remanded the case for a new trial because the defendant's attorney was not allowed to show the number and nature of the witness's prior convictions.

> Here, under Va. Code Ann. § 19.2-265 (now § 19.2-269), the triers of fact were entitled to know the number and nature of the felony convictions of the witness . . . but not the details thereof, so they could evaluate his testimony and determine what credit it should be given.

217 Va. at 550, 231 S.E.2d at 217.

Despite the crucial language of *Hummel*, which ostensibly limits the permissible information to the number and nature of past felonies, the court will also allow the details of such convictions to be admitted when they are material to the attack on credibility. • *Whittaker, 217 Va. at 967, 234 S.E.2d at 81.*

The witness against the defendant in *Whittaker* had a record consisting of six prior convictions for burglary. The trial court refused to allow the defendant's attorney to ask the witness about the details of his punishment; the attorney desired such details to show that the Commonwealth had provided leniency in exchange for his testimony. The court reversed, holding that the details were admissible because they were material:

> *Hummel* is inapposite. There, the defendant's purpose in eliciting the testimony was to discredit the character of the prosecution witness . . . for such purpose,

the "details" of the felonies would have been immaterial. Here, Whittaker's purpose was to lay the predicate for an inference that the testimony of the prosecution witness was biased and unreliable because induced by considerations of self-interest; for such purpose, the quantum of the sentence imposed upon [the witness's] several convictions was highly relevant.

217 Va. at 967, 234 S.E.2d at 81.

• ***Impeachment upon pleas.*** A defendant cannot be impeached with a conviction upon a not guilty plea where sentence is yet to be imposed. *Dowell v. Commonwealth, 12 Va. App. 1145, 1149, 408 S.E.2d 263, 265–66 (1991), aff'd en banc,14 Va. App. 58, 58, 414 S.E.2d 440, 440 (1992).* Compare *Fields v. Commonwealth, 5 Va. App. 229, 234, 361 S.E.2d 359, 362 (1987)* (holding that "a witness has the status of a convicted felon, for impeachment purposes," upon the trial court's acceptance of his voluntary guilty plea). A defendant or witness can be impeached after a guilty plea but before sentence is imposed. *Jewel v. Commonwealth, 30 Va. App. 416, 422–24, 517 S.E.2d 264, 267–68 (1999).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.12, 17.14, 17.16, 17.34

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 50.1

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-4, 8-4A, 12-4, 12-5

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 58, 59; Evidence §§ 47, 48; and Witnesses §§ 39, 64–66

Instruction No. 2.550

Statement of the Defendant

The statements presented to you as having been made by the defendant are submitted for your consideration along with all the other evidence. The weight, value, credibility, and reliability of those statements are questions for your determination.

SOURCES & AUTHORITY

GOVERNING STATUTES:

None.

PRINCIPAL CASE AUTHORITY:

Cherrix v. Commonwealth, 257 Va. 292, 306–07, 513 S.E.2d 642, 651–52 (1999).

OTHER RELEVANT DECISIONS:

Pritchett v. Commonwealth, 263 Va. 182, 186, 557 S.E.2d 205, 208 (2002); Jackson v. Commonwealth, 193 Va. 664, 673–74, 70 S.E.2d 322, 327–28 (1952); Upshur v. Commonwealth, 170 Va. 649, 656–57, 197 S.E. 435, 438 (1938).

PRACTICE COMMENTARY: In *Cherrix*, the Supreme Court of Virginia found that an instruction featuring language substantially identical to that appearing in the model instruction adequately apprised the jury of its role in assessing the weight and credibility of the defendant's statements. *257 Va. at 306–07, 513 S.E.2d at 651–52.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.12, 17.14

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 47.1, 50.1

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 58, 59; Evidence §§ 47, 48, 50, 52–54; and Witnesses §§ 39, 64–67, 71–73

Instruction No. 2.560

Prior Inconsistent Statement of Witness

If you believe from the evidence that a witness [other than the defendant] **previously made a statement inconsistent with his testimony at this trial, the only purpose for which that statement may be considered by you is for its bearing on the witness' credibility. It is not evidence that what the witness previously said is true.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 8.01-403, 8.01-404.

PRINCIPAL CASE AUTHORITY:

Wells v. Commonwealth, 32 Va. App. 775, 783, 531 S.E.2d 16, 19–20 (2000); Royal v. Commonwealth, 234 Va. 403, 405, 362 S.E.2d 323, 324 (1987); Hall v. Commonwealth, 233 Va. 369, 374–76, 355 S.E.2d 591, 594–96 (1987).

PRACTICE COMMENTARY: The purpose of this instruction is to explain the limited basis on which the prior inconsistent statement was admitted, not to instruct on the effect it has on the witness's credibility. Instruction No. 2.500 (Credibility of Witnesses) is adequate for the latter purpose.

Before extrinsic evidence of a prior inconsistent statement is admissible, the statement must be mentioned to the witness and he must be asked whether or not he made such a statement. Va. Code Ann. § 8.01-403. For a discussion on the admissibility of prior consistent statements of witnesses, see *Anderson v. Commonwealth, 282 Va. 457, 717 S.E.2d 623 (2011).*

☞ ***PRACTICE POINTER:***

The bracketed language in this instruction should be used in cases where the instruction is given as to a witness other than the defendant and the defendant has also testified inconsistently with prior statements which have been admitted as party admissions.

If the witness is the defendant, do not use this instruction; use Instruction No. 2.580 instead.

☞ ***PRACTICE POINTER:***

For a discussion of additional cases supporting the language of this model instruction, see the Sources & Authority statement for Virginia Model Jury Instructions—Civil, Instruction No. 2.560 (Prior Inconsistent Statement by Witness).

ALERTS:

• In *Royal*, the Supreme Court of Virginia held that it was error for the trial court to refuse a requested instruction, which, as described, featured language similar to that appearing in the model instruction. *234 Va. at 405–06, 362 S.E.2d at 324.* In *Hall*, the Court held that the instruction must be given, if requested, even though the inconsistent statement may not have been formally admitted in evidence. *233 Va. at 375, 355 S.E.2d at 595.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.17, 17.23

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW & PROCEDURE § 47.1

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Evidence § 53; and Witnesses §§ 54, 56 through 63, 71, 74, 278

Instruction No. 2.580

Prior Inconsistent Statement of Defendant

If you believe from the evidence that the defendant previously made a statement inconsistent with his testimony at this trial, that previous statement may be considered by you as proof that what the defendant previously said is true.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 8.01-403, 8.01-404.

PRINCIPAL CASE AUTHORITY:

Groggins v. Commonwealth, 34 Va. App. 19, 23–25, 537 S.E.2d 605, 607–08 (2000).

OTHER RELEVANT DECISIONS:

Bynum v. Commonwealth, 28 Va. App. 451, 459, 506 S.E.2d 30, 34 (1998); Satcher v. Commonwealth, 244 Va. 220, 256, 421 S.E.2d 821, 843 (1992); Land v. Commonwealth, 211 Va. 223, 229, 176 S.E.2d 586, 590–91 (1970).

PRACTICE COMMENTARY: In *Groggins*, the Court of Appeals held that an instruction featuring language substantially identical to that appearing in the model instruction was "a correct statement of law" and that it was properly given under the facts of that case. *34 Va. App. at 23–25, 537 S.E.2d at 607–08.*

While Va. Code Ann. § 8.01-404 prevents the impeachment of a witness by the use of an affidavit, statement or transcript made after an accident, it does not prevent proof of prior inconsistent statements by oral testimony, even when such statements were reduced to writing and signed by the witness. Also, the signed statement may be used to refresh the recollection of the witness. *Ruhlin v. Samaan, 282 Va. 371, 378–79, 718 S.E.2d 447, 450–51 (2011).*

☞ ***PRACTICE POINTER:***

The defendant's prior statement constitutes a party admission, admissible not only for impeachment, but also as substantive evidence. *Land, 211 Va. at 229, 176 S.E.2d at 590–91; Bynum, 28 Va. App. at 459, 506 S.E.2d at 34.*

☞ ***PRACTICE POINTER:***

For a discussion of additional cases supporting the language of this model instruction in a civil context, see the Sources & Authority statement for Virginia Model Jury Instructions—Criminal, No. 2.580 (Prior Inconsistent Statement by Party).

ALERTS:

• This instruction is to be used only in regard to the defendant's testimony where evidence has been introduced that the defendant made a prior inconsistent statement. For testimony of other witnesses, use Instruction No. 2.560 instead.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 17.17, 17.23

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW & PROCEDURE § 47.1

Charles E. Friend & Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 8-1 through 8-9, 12-1 through 12-12

MICHIE'S JURISPRUDENCE, Evidence § 53; and Witnesses §§ 54, 56 through 63, 71, 74, 278

Instruction No. 2.700

Duty of Jury in Fixing Punishment

You have found the defendant guilty of (name of offense). **You should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards.**

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). The bracketed language should only be used when such request has been timely made by the defendant.)

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Bruton v. Commonwealth, 63 Va. App. 210, 755 S.E.2d 485 (2014); Fishback v. Commonwealth, 260 Va. 104, 115–16, 532 S.E.2d 629, 634 (2000); *Walker v. Commonwealth, 25 Va. App. 50, 61–62, 486 S.E.2d 126, 132 (1997); Jones v. Commonwealth, 194 Va. 273, 275, 72 S.E.2d 693, 694 (1952); Coward v. Commonwealth, 164 Va. 639, 646, 178 S.E. 797, 800 (1935).*

OTHER RELEVANT DECISIONS:

Booker v. Commonwealth, 276 Va. 37, 41, 661 S.E.2d 461, 463 (2008); *Swain v. Commonwealth, 28 Va. App. 555, 561, 507 S.E.2d 116, 119 (1998); Gray v. Commonwealth, 28 Va. App. 227, 234, 503 S.E.2d 252, 255 (1998); Frye v. Commonwealth, 231 Va. 370, 397–98, 345 S.E.2d 267, 268 (1986); Caldwell v. Commonwealth, 221 Va. 291, 297, 269 S.E.2d 811, 815 (1980); Clark v. Commonwealth, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979); Hinton v. Commonwealth, 219 Va. 492, 495–96, 247 S.E.2d 704, 706 (1978).*

PRACTICE COMMENTARY: This instruction is usually given in response to a question by the jury. The language of the instruction comes from *Coward, 164 Va. at 646, 178 S.E. at 800*: "These jurors should have been told that it was their duty, if they found the accused guilty, to impose such sentence as seemed to them to be just. What might happen afterwards was no concern of theirs." The use of this instruction was upheld in *Jones, 194 Va. at 275, 72 S.E.2d at 694*: "[I]t is the duty of the jury if they find the accused guilty to impose such punishment as they consider to be just under the evidence and within the limits stated in the court's instructions; and that they must not concern themselves with what may afterwards happen." *See also Walker, 25 Va. App. at 61–62, 486 S.E.2d at 132* (citing model instruction as reflecting Virginia's longstanding commitment to narrow scope of jury's sentencing role).

In *Bruton*, the court held that it was not error to respond to a question during the sentencing phase from the jury which had heard evidence from defendant as to the amount of time he had been incarcerated before trial, that the defendant would receive credit for the time he was incarcerated while awaiting trial. The trial court's instruction to the jury resolved any misconception without creating any attendant risk of speculation. *Bruton, 63 Va. App. at 215, 755 S.E.2d at 487–88.*

PRACTICE POINTER:

None.

ALERTS:

• When a defendant has been convicted of a Class 1 felony committed on or after January 1, 1995, the defendant is entitled to an instruction informing the jury that he will not be eligible for parole if sentenced to imprisonment for life. Va. Code

Ann. § 19.2-264(A). See Instruction No. 33.126. When a defendant has been convicted of a Class 2, 3, 4, 5, or 6 felony committed on or after January 1, 1995, the defendant is entitled to an instruction that informs the jury of his parole ineligibility. *Fishback v. Commonwealth, 260 Va. 104, 115–16, 532 S.E.2d 629, 634 (2000).* See Instruction Nos. 2.705 and 2.710.

• Note as well that in *Fishback*, the Supreme Court of Virginia overruled *Coward* and its progeny to the extent that those cases are inconsistent with the limitation the Court placed on the rule derived from *Coward* with regard to jury instructions concerning good behavior credits and executive clemency. *Fishback, 260 Va. at 116, 532 S.E.2d at 634.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE §§ 19.1–19.3

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 63.1, 63.3, 63.5, 63.6, 63.7, 63.13

MICHIE'S JURISPRUDENCE, Criminal Procedure §§ 70, 72

Instruction No. 2.705

Parole

Any person sentenced to a term of incarceration for a felony offense shall not be eligible for parole upon that sentence.

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). The bracketed language should only be used when such request has been timely made by the defendant.)

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-10, 53.1-165.1, 53.1-40.01, 53.1-202.1

PRINCIPAL CASE AUTHORITY:

Fishback v. Commonwealth, 260 Va. 104, 115–16, 532 S.E.2d 629, 634 (2000).

OTHER RELEVANT DECISIONS:

Waters v. Commonwealth, 39 Va. App. 72, 80–83, 569 S.E.2d 763, 767–68 (2002); Hills v. Commonwealth, 262 Va. 807, 810, 553 S.E.2d 722, 723–24 (2001).

PRACTICE COMMENTARY: This instruction must be given if requested in the trial of all non-capital felony offenses committed on or after January 1, 1995. See *Waters, 39 Va. App. at 80–83, 569 S.E.2d at 767–68.*

ALERTS:

• Juries should not be instructed, however, with regard to early release for good behavior. *Fishback, 260 Va. at 115–16, 532 S.E.2d at 634.*

RESEARCH REFERENCES:

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 63.12

MICHIE'S JURISPRUDENCE, Pardon, Probation and Parole § 5

Instruction No. 2.710

Parole—Age

Any person sentenced to a term of incarceration for a felony offense (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed, or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). The bracketed language should only be used when such request has been timely made by the defendant.)

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-10, 53.1-165.1, 53.1-40.01, 53.1-202.2

CASE AUTHORITY:

Fishback v. Commonwealth, 260 Va. 104, 115–16, 532 S.E.2d 629, 634 (2000).

PRACTICE COMMENTARY: This instruction must be given in the trial of all non-capital felony offenses committed on or after January 1, 1995, only if the defendant's age and the permissible range of punishment might permit petition for geriatric release. *Fishback, 260 Va. at 115–16, 532 S.E.2d at 634.*

ALERTS:

Va. Code Ann. § 18.2-10(a), effective July 1, 2021, provides, in pertinent part: "Any person who was 18 years of age or older at the time of the offense and who is sentenced to imprisonment for life upon conviction of a Class 1 felony shall not be eligible for . . . (iii) conditional release pursuant to § 53.1-40.01 or 53.1-40.02."

RESEARCH REFERENCES:

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 63.12

MICHIE'S JURISPRUDENCE, Pardon, Probation and Parole § 5

Instruction No. 2.720

Possible Verdicts

Under the charge against the defendant, you may return any one of the following verdicts, which verdict must be unanimous:

(1) Not guilty; [or]

(2) Guilty [of murder in the first degree; or

(3) Guilty of murder in the second degree; or

(4) Guilty of voluntary manslaughter].

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

• The instruction lists the alternatives that would be available to the jury in a typical murder case. Counsel and the court, however, should amend the instruction in each particular case so that all of the possible alternatives are covered. In the appropriate case, the possible verdict of "Not guilty by reason of insanity" should be given. The law of homicide was chosen only for illustrative purposes.

• When the jury is instructed on the defense of insanity at the time of the offense, the related verdict form must provide the jury with all three options: Guilty; Not Guilty; and Not Guilty By Reason of Insanity.

Instruction No. 2.740

Form Findings—Felony and Misdemeanor

We the jury find the defendant guilty of (describe most serious offense first such as: malicious wounding, grand larceny, etc.) **as charged in the indictment.**

_____

Foreman

OR

We the jury find the defendant guilty of (describe next most serious offense) **as charged in the indictment.**

_____

Foreman

OR

We the jury find the defendant guilty of (describe least serious offense) **as charged in the indictment.**

_____

Foreman

OR

We the jury find the defendant guilty of (misdemeanor) **as charged in the indictment.**

_____

Foreman

OR

We the jury find the defendant not guilty.

_____

Foreman

***ALERTS*:**

• When the jury is instructed on the defense of not guilty by reason of insanity at the time of the offense, the related verdict form must provide the jury with that option also.

OR

We the Jury find the defendant guilty of (misdemeanor) as charged in the indictment.

Foreman

OR

We the Jury find the defendant not guilty

Instruction No. P2.740

Form Findings—Felony and Misdemeanor

We, the jury, having found the defendant guilty of (name of the offense), **fix his punishment at** _____.

_____

Foreman

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A). The bracketed language should only be used when such request has been timely made by the defendant.)

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Jackson v. Commonwealth, 218 Va. 490, 494, 237 S.E.2d 791, 793 (1977); Bacci v. Commonwealth, 213 Va. 236, 237–38, 191 S.E.2d 182, 183 (1972); Banner v. Commonwealth, 204 Va. 640, 645, 133 S.E.2d 305, 309 (1963); Lane v. Commonwealth, 190 Va. 58, 65–66, 55 S.E.2d 450, 453–54 (1949).

PRACTICE COMMENTARY: It is important to include the word "or" between the alternatives. It is also critical to include the phrase "as charged in the indictment" when any of the above alternatives are used. These words serve as a substitute for a statement that recites the specific criminal intent that is part of the offense. The requirement stems from *Banner*, where the jury returned a verdict finding the defendant guilty of unlawful maiming. The Court stated that the verdict and the judgment rendered thereon were nullities because "the verdict failed to recite that the wounding was done with the requisite 'intent to maim, disfigure, disable, or kill' or to state that it was committed 'as charged in the indictment.' " *204 Va. at 645, 133 S.E.2d at 309.*

ALERTS:

• While the failure to name the victim is not fatal to the verdict, it must recite the requisite intent articulated by the statute or state that the defendant is guilty of the offense "as charged in the indictment." *Id.*; See also *Lane, 190 Va. at 65–66, 55 S.E.2d at 453–54.* The Court upheld this rule in *Bacci.*

• Nevertheless, in *Jackson* the Court refused to reverse the defendant's conviction for malicious wounding because the verdict of the jury did not explicitly recite the requisite intent or specifically refer to the indictment. However, the court distinguished *Banner* and *Bacci* in that those cases involved instructions that defined assault and battery, as well as malicious wounding. In *Jackson*, all references to assault and battery were stricken. As a result, the jury had only three choices: malicious wounding with the requisite intent, unlawful wounding with the requisite intent, or acquittal. Under these circumstances, the Court inferred that the jury found the requisite intent by necessary implication and that "while the verdict forms furnished to the jury were not drafted with desirable specificity and precision, the verdicts were not fatally defective." *Jackson, 218 Va. at 494, 237 S.E.2d at 793.*

Instruction No. 2.780

Verdict—"Allen Charge"

As you have been told, your verdict must be unanimous. If you can possibly reach a verdict, it is your duty to do so. You should listen to the views and opinions of your fellow jurors with fairness and candor and you should give consideration to what they say. However, you must decide the case for yourself and you should reach an agreement only if it can be done without sacrificing your individual judgment. During the course of your deliberations, each of you, whether in the majority or the minority, should not hesitate to re-examine your own views and change your opinion if you are convinced it was wrong. No juror, however, should give up his honest opinion as to the evidence solely because of the opinion of his fellow jurors or for the mere purpose of returning a verdict.

If you can reach a decision without surrendering your conscientious opinion, it is your duty to do so.

Please return to the jury room and give the matter your further consideration. Thank you.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Titcomb v. Wyant, 1 Va. App. 31, 36, 41, 333 S.E.2d 82, 85, 87–88 (1985); Allen v. United States, 164 U.S. 492, 501–02 (1896).

OTHER RELEVANT DECISIONS:

Joseph v. Commonwealth, 249 Va. 78, 87, 452 S.E.2d 862, 868 (1995); Tuggle v. Commonwealth, 228 Va. 493, 508–09, 323 S.E.2d 539, 548 (1984); Poindexter v. Commonwealth, 213 Va. 212, 214–15, 191 S.E.2d 200, 202–03 (1972).

PRACTICE COMMENTARY: For an alternative instruction, see *Titcomb, 1 Va. App. at 36, 41, 333 S.E.2d at 85, 87–88.*

Va. Code Ann. § 19.2-295.1 provides:

If the jury cannot agree on a punishment, the court shall fix punishment.

(Effective July 1, 2021, an accused must request to be sentenced by a jury, by written pleading filed at least 30 days prior to trial. Otherwise, an accused found guilty by the jury will be sentenced by the court. Va. Code Ann. § 19.2-295(A).)

At a resentencing hearing, in addition to receiving evidence specifically permitted by that statute, the jury may consider the physical evidence admitted and marked as exhibits in the first trial, and there may be read to the jury "so much of the transcript of the testimony and proceedings in the first trial as may be necessary to show the nature of the offense charged and the circumstances under which it was committed." *Booker v. Commonwealth, 60 Va. App. 35, 40–46, 723 S.E.2d 621, 623–626 (2012)*; *Hills v. Commonwealth, 262 Va. 807, 810–811, 553 S.E.2d 722, 722–724 (2001).*

ALERTS:

• See *Tuggle, 228 Va. at 508–09, 323 S.E.2d at 548*, where the court stated that an instruction that jurors are "not required to surrender their convictions merely to render a verdict . . . is an invitation for jurors to disagree."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 18.4

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 57.10

MICHIE'S JURISPRUDENCE, Instructions §§ 3, 36

Instruction No. 2.800

Note on Eyewitness Identification

Virginia's appellate courts have neither approved nor disapproved granting an appropriate instruction concerning eyewitness testimony. The Court has affirmed judgments in which the trial court refused to give a cautionary instruction on eyewitness identification because it concluded that the matters contained in the proposed instructions were covered by other instructions. See *Watson v. Commonwealth, 298 Va. 197, 210, 835 S.E.2d 906, 912 (2019)*; *Graham v. Commonwealth, 250 Va. 79, 86–87, 459 S.E.2d 97, 100–01 (1995)*; *Satcher v. Commonwealth, 244 Va. 220, 256, 421 S.E.2d 821, 843 (1992)*; *Poole v. Commonwealth, 211 Va. 258, 260–61, 176 S.E.2d 821, 823–24 (1970)*; *Ives v. Commonwealth, 184 Va. 877, 879, 36 S.E.2d 904, 904–05 (1946)*.

In 2008, the Court reiterated this approach. In *Daniels v. Commonwealth, 275 Va. 460, 657 S.E.2d 84 (2008)*, the Court affirmed the lower court's refusal to grant an instruction on eyewitness identification, reasoning that the instructions which were given " 'fully and fairly' covered the legal principles addressed in the proposed instruction." *Id. at 467, 657 S.E.2d at 87*. In affirming the trial court's decision not to give the proffered instruction, the Supreme Court explicitly stated that "[n]othing in [the] instruction addresse[d] the concept of sincere mistake or the inherent dangers of eyewitness identification testimony." *Id. at 466, 657 S.E.2d at 87*. Consequently, the Court declined to consider those arguments in reaching its decision.

More recently, in *Payne v. Commonwealth, 292 Va. 855, 794 S.E.2d 577 (2016)*, the Supreme Court stated that its holding was "no different" from that in *Daniels*, where the Court had held that, while an eyewitness ID instruction was not required in every case where identification was central to the case, neither was it prohibited, and in the proper case the court would not abuse its discretion in granting such an instruction. *Id. at 872, 794 S.E.2d at 586*.

Furthermore, the Court in *Payne* held that the granted instructions adequately addressed the issue of the identification. For example, Model Jury Instruction No. 2.500 addressed both the issue of reliability of eyewitness testimony as well as credibility by permitting the jury to consider the witnesses' opportunity for knowing the truth and for having observed the things about which they testified. *Id. at 870–71, 794 S.E.2d at 585*. The instruction also advised that the jurors could use their "common sense," and could consider "all the other circumstances of the case" in determining the believability and weight of testimony.

In refusing Payne's proffered eyewitness identification instruction, the Court opined that the specificity of that instruction "counseled against its use." In essence, the specificity suggested a limitation on what the jury could consider, to the factors included in the instruction. *Id. at 871, 794 S.E.2d at 585–86*. The trial court had said that the instruction limited the jury to a "four-point checklist of factors." *Id. at 864, 794 S.E.2d at 582*.

In *Watson v. Commonwealth, 298 Va. 197, 210, 835 S.E.2d 906, 912 (2019)*, the Court affirmed the trial court's refusal to issue a verbatim version of Instruction No.

2.800, even though the Court noted that there was no question that the model instruction was a correct statement of the law, was supported by the evidence, and was otherwise the sort of instruction that the Court anticipated in *Payne*. In so ruling, the Court emphasized that a court may properly exclude an instruction that both correctly states the law and is supported by the evidence as long as other granted instructions fully and fairly cover the relevant principles of law. *Id.*

At present, the vast majority of federal circuits and over 20 states have adopted an instruction addressing eyewitness testimony. See *Perry v. New Hampshire, 132 S. Ct. 716, 729 n.7 (2012)* (citing model eyewitness instructions in federal and state jurisdictions). The approaches taken by the federal circuits and sister states vary as to whether such an instruction is mandatory. In *Perry*, the Court grounded its holding—that due process does not require a preliminary inquiry into the reliability of an eyewitness identification not arranged by law enforcement—partially on the "safeguards built into [the] adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." *132 S. Ct. at 728*. According to the Court, one of these safeguards is the availability of "[e]yewitness-specific jury instructions, which many federal and state courts have adopted, [which] likewise warn the jury to take care in appraising identification evidence." *Id. at 728–29*. A number of courts in sister states have adopted model eyewitness instructions both before and after *Perry*. *State v. Henderson, 27 A.3d 872 (N.J. 2011)*; *State v. Long, 721 P.2d 483 (Utah 1986)*; *State v. Cabagbag, 127 Haw. 302 (Haw. 2012)*; *In re: Standard Jury Instructions in Criminal Cases—Report No. 2011-05, No. SC11-2517 (Fla. 2012)*.

Other courts adopted instructions prior to *Perry*. See *Perry, 132 S. Ct. at 728–29* (citing instructions from federal and state courts). See, e.g., *United States v. Greene, 704 F.3d 298, 313 (4th Cir. 2013)*; *Barber v. United States, 412 F.2d 775 (5th Cir. 1969)*; *Commonwealth v. Rodriguez, 391 N.E.2d 889, 897–98 (Mass. 1979)*; *Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997)*; *State v. Dyle, 899 S.W.2d 607 (Tenn. 1995)*; *State v. Long, 721 P.2d 483, 487–95 (Utah 1986)*; *State v. Watson, 318 S.E.2d 603 (W. Va. 1984)*. Efforts to further improve instructions addressing eyewitness testimony have continued subsequent to *Perry*. See, e.g., *Commonwealth v. Gomes*, 22 N.E.3d 897, 909–10 (2015) (explaining that "a principle is so generally accepted that it is appropriate to include in a model eyewitness identification instruction where there is a near consensus in the relevant scientific community adopting that principle," and concluding that, based on scholarly research, analyses by other courts, amici submissions, and a state court study group report and comments, "there are various principles regarding eyewitness identification for which there is a near consensus in the relevant scientific community" making it "appropriate to revise the [Commonwealth v.] Rodriguez [model eyewitness] instruction to include them"); Supreme Judicial Court of Massachusetts, Study Group on Eyewitness Evidence—Report and Recommendations to the Justices (July 25, 2013), available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf [http://perma.cc/WY4M-YNZN], and comments responding thereto, available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-comments.pdf [http://perma.cc/UF62-STVZ].

Given the complexity of the issue as well as the Supreme Court's view that a trial

court may grant such an instruction in its discretion, the instruction below represents the committee's effort to craft such an instruction in order to assist the practitioner. The court and practitioners should be mindful that this instruction has not been approved by the Court of Appeals of Virginia or the Supreme Court of Virginia.

You should evaluate the testimony of an eyewitness who identified the defendant as the person he saw [committing the crime; involved in the crime] **in the same manner as you would for any other witness, including any biases or motives to lie. Additionally, even if you believe the witness was trying to tell the truth, you must still decide whether the witness was accurate about the identification or instead made an honest mistake. In weighing such testimony, you may consider the following:**

Whether the witness had an adequate opportunity to observe the person [committing the crime; involved in the crime]; **circumstances** such as [the amount of time the witness had to observe the person (committing a crime; involved in the crime); the distance between the witness and the person (committing the crime; involved in the crime); lighting conditions; weather conditions; obstructions; how closely the witness was paying attention to the person (committing the crime; involved in the crime); whether the witness knew a crime was being committed; the extent to which the person's features were visible and undisguised; whether a weapon was present that may have affected the attention of the witness]**, and any other circumstances you believe are important.**

You may consider whether the witness had the ability to observe the person [committing the crime; involved in the crime]**. In that regard circumstances you may consider include [the witness's intelligence; whether the witness was stressed or frightened, fatigued, injured, or under the influence of drugs or alcohol at the time he made the observations; whether the witness had impaired vision which was uncorrected at the time he made the observations; whether the witness and the person** [committing a crime; involved in the crime] **were of different races, because some witnesses may have greater difficulty in accurately identifying members of a different race, and any other circumstances you believe are important.**

You may consider whether the witness's identification of the defendant was the product of the witness's own memory or to what extent it was may have been the result of outside influences. Circumstances you may consider include [whether the witness ever gave a description of the person who [committed the crime; was involved in the crime] **and, if so, how that description compares to the defendant; whether the witness knew or had seen the defendant prior to witnessing the crime; the amount of time that passed between the crime and the witness's later identification of the defendant; whether the witness made the identification after being exposed to any outside influences or information, which may include any opinions,**

descriptions, or identifications given by others, photographs, newspaper accounts, televised or online news stories, or any other outside information or influences; whether the witness was ever presented with the defendant and failed to identify the defendant as the person who (committed the crime; was involved in the crime) **or previously identified a different individual as the person who** (committed the crime; was involved in the crime)**, whether the witness was able to identify other participants in the crime], and any other circumstances you believe are important.**

In weighing the witness's identification, you may consider whether the procedures used by law enforcement had any influence on the witness's identification. For example, you may consider the manner in which photographs were selected and presented to the witness, or comments made by the police to the witness.

The witness(es) who testified about the identification of the person who [committed the crime(s); was involved in the crime] **do(es) not have to be certain that the identification he made is correct. A witness may be unsure and still be correct in his identification. On the other hand, a witness's confidence in his identification does not mean that the identification is accurate.**

This instruction is not intended to direct you to give more or less weight to the eyewitness identification evidence. It is your duty to determine what weight to give to that evidence.

As with all instructions, the instruction should be revised to fit the facts of the particular case. Thus, for example, if the eyewitness did not make a cross-racial identification, the language about an identification of a person of a different race should be removed from the instruction.

The instruction provides that the jury may consider whether the procedures law enforcement officers used may have influenced the witness's identification. The Model Policy on Eyewitness Identification, which was adopted by the Virginia Department of Criminal Justice Services on November 16, 2011, and later revised, sets forth best practices with regard to lineup and photographic lineup procedures. These detailed procedures, for example, provide that in photographic lineups, the photographs should be presented sequentially rather than all at once, give instructions about the use of fillers, and instruct law enforcement personnel to "[a]void saying anything to the witness that may influence the witness's selection." The Model Policy is available online at the website of the Department of Criminal Justice Services. See https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/law-enforcement/files/model-policy/lineups-eyewitness_identification.doc (March 19, 2014 rev. ed.) (last visited January 18, 2018).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL PROCEDURE § 8.1

MICHIE'S JURISPRUDENCE, Evidence § 175; Identity § 3; Photographs and Photographers § 5; and Witnesses § 79

CHAPTER 3

PRINCIPALS, ACCESSORIES AND ACCOMPLICES

Scope Note

Instruction No. 3.100 Principal in the Second Degree

Instruction No. 3.150 Principal in the Second Degree—Presence Defined

Instruction No. 3.160 Concert of Action

Instruction No. 3.200 Accessory Before the Fact

Instruction No. 3.300 Accessory After the Fact

Instruction No. P3.300(a) Accessory After the Fact—Homicide Punishable as a Class 1 or 2 Felony

Instruction No. P3.300(b) Accessory After the Fact—Other Felonies

Instruction No. 3.400 Testimony of Accomplice

Instruction No. 3.500 Principal in the Second Degree, Accessory Before the Fact—Illustration

Instruction No. P3.500 Principal in the Second Degree, Accessory Before the Fact—Illustration

Instruction No. 3.600 Misdemeanors

SCOPE NOTE

The instructions in this chapter primarily define the various types of principals, accessories, accomplices and their liability under Virginia criminal law. They do not cover any substantive offenses and should always be given in conjunction with the applicable underlying substantive offense instruction. It will be necessary to tailor the substantive offense instruction to fit the context of these instructions. Since a principal in the second degree and an accessory before the fact are, by statute, liable for the same punishment as the person who actually commits the crime (a principal in the first degree), the relevant punishment provision will be found in the underlying substantive offense instruction. In misdemeanor cases, Virginia follows the common law. There are no accessories before the fact or principals in the second degree; all involved parties are principals and may be convicted of the misdemeanor. *Wade v. Commonwealth, 56 Va. App. 689, 695, 696 S.E.2d 258, 260 (2010).*

Instruction No. 3.100 defines "principal in the second degree," and Instruction No. 3.150 defines the word "presence" as it is used in the definition of a principal in the second degree. Both are based on Va. Code Ann. § 18.2-18. Instruction No. 3.160 defines "concert of action," and Instruction No. 3.200 defines "accessory before the fact," also based on Va. Code Ann. § 18.2-18.

Instruction No. 3.300 is a finding instruction for accessory after the fact, based on Va. Code Ann. § 18.2-19, and can be used with any underlying substantive felony.

Instructions No. P3.300(a) and P3.300(b) are punishment instructions for accessory after the fact. Instruction No. P3.300(a) is applicable only to those specified homicide cases. Instruction No. P3.300(b) is applicable to accessories after the fact for all other underlying substantive felonies. The punishment for those offenses remains a Class 1 misdemeanor.

Instruction No. 3.400 is a cautionary instruction applicable only where the testimony of an accomplice is uncorroborated by material facts tending to connect the accused with the crime. *Dillard v. Commonwealth, 216 Va. 820, 823, 224 S.E.2d 137, 140 (1976).*

Instructions No. 3.500 and P3.500 are illustrations of how to prepare instructions on principal in the second degree or accessory before the fact using the underlying substantive crime of burglary as an example.

Instruction No. 3.600 covers accomplices to misdemeanors.

Instruction No. 3.100

Principal in the Second Degree

A principal in the second degree is a person who did not actually commit the crime, but rather is present and knowingly assists by helping in the commission of the crime. It must be shown that he [intended by his words, gestures, signals or actions to encourage, advise, urge, or help the person who actually committed the crime; shared the criminal intent of the person who actually committed the crime]. **Presence and consent alone are not sufficient to make a person a principal in the second degree.**

A principal in the second degree is liable for the same punishment as the person who actually committed the crime.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-18.

PRINCIPAL CASE AUTHORITY:

Thomas v. Commonwealth, 279 Va. 131, 156–57, 688 S.E.2d 220, 234 (2010); Rollston v. Commonwealth, 11 Va. App. 535, 538–41, 399 S.E.2d 823, 825–27 (1991); Johnson v. Commonwealth, 220 Va. 146, 152, 255 S.E.2d 525, 527–30 (1979).

OTHER RELEVANT DECISIONS:

Suter v. Commonwealth, 67 Va. App. 311, 796 S.E.2d 416 (2017); Ferrell v. Commonwealth, 62 Va. App. 142, 150–51, 743 S.E.2d 284, 288–89 (2013); Dunn v. Commonwealth, 52 Va. App. 611, 618–21, 665 S.E.2d 868, 871–72 (2008); Brickhouse. v. Commonwealth, 276 Va. 682, 687–88, 668 S.E.2d 160, 163 (2008); McMorris v. Commonwealth, 276 Va. 500, 505–08, 666 S.E.2d 348, 350–52 (2008); McAlevy v. Commonwealth, 270 Va. 378, 380, 620 S.E.2d 758, 759 (2005); Muhammad v. Commonwealth, 269 Va. 451, 482, 619 S.E.2d 16, 33 (2005); Hood v. Commonwealth, 269 Va. 176, 182–83, 608 S.E.2d 913, 916 (2005); Washington v. Commonwealth, 43 Va. App. 291, 306–08, 597 S.E.2d 256, 263–64 (2004); Smith v. Commonwealth, 33 Va. App. 65, 70–71, 531 S.E.2d 608, 610 (2000); Hampton v. Commonwealth, 32 Va. App 644, 648–52, 529 S.E.2d 843, 845–46 (2000); Bass v. Commonwealth, 31 Va. App. 373, 389–91, 523 S.E.2d 534, 542–43 (2000); Hunt v. Commonwealth, 25 Va. App. 395, 402–04, 488 S.E.2d 672, 676–77 (1997); McGill v. Commonwealth, 24 Va. App. 728, 733, 485 S.E.2d 173, 175 (1997); Allard v. Commonwealth, 24 Va. App. 57, 62–63, 480 S.E.2d 139, 141–42 (1997); Fleming v. Commonwealth, 13 Va. App. 349, 352–53, 412 S.E.2d 180, 182 (1991); Carter v. Commonwealth, 232 Va. 122, 125–27, 348 S.E.2d 265, 267–68 (1986); Ramsey v. Commonwealth, 2 Va. App. 265, 269–70, 343 S.E.2d 465, 468–69 (1986); Bailey v. Commonwealth, 229 Va. 258, 262, 329 S.E.2d 37, 40 (1985); Sutton v. Commonwealth, 228 Va. 654, 666, 324 S.E.2d 665, 671 (1985); Hall v. Commonwealth, 225 Va. 533, 536, 303 S.E.2d 903, 904 (1983); Moehring v. Commonwealth, 223 Va. 564, 567–68, 290 S.E.2d 891, 892–93 (1982); Sult v. Commonwealth, 221 Va. 915, 918, 275 S.E.2d 608, 609 (1981); Foster v. Commonwealth, 179 Va. 96, 100, 18 S.E.2d 314, 316 (1942); Brown v. Commonwealth, 130 Va. 733, 736, 107 S.E. 809, 810 (1921).

PRACTICE COMMENTARY: While the basic definition of liability as an accomplice in the second degree is well settled, some cases worded the mens rea requirement differently. One line of authority indicates the defendant must "share the criminal intent" of the perpetrator. *McGill, 24 Va. App. at 733, 485 S.E.2d at 175*; *Rasnake v. Commonwealth, 135 Va. 677, 706–10, 115 S.E. 543, 553–54 (1923)*; *Horton v. Commonwealth, 99 Va. 848, 865, 38 S.E. 184, 186 (1901)*. The other line of authority indicates that the defendant must intend his actions to aid or assist in the commission of the crime. *Spradlin v. Commonwealth, 195 Va. 523, 526–28, 79 S.E.2d 443, 445 (1954)*; *Harold v. Commonwealth, 147 Va. 617, 623,*

136 S.E. 658, 660 (1927); *Brown, 130 Va. at 736–37, 107 S.E. at 810–11.* Later cases resolve the issue by holding that the defendant must either knowingly assist the perpetrator or share the criminal intent of the perpetrator. *Thomas, 279 Va. at 156–57, 688 S.E.2d at 234*; *McMorris, 276 Va. at 505, 666 S.E.2d at 351.*

A defendant may be convicted as a principal in the second degree to murder without proof of specific intent to kill when there is shared criminal intent with the principal. *Rollston, 11 Va. App. at 539–41, 399 S.E.2d at 823–26.* Furthermore, a defendant "can be charged with specific intent where he or she gives encouragement knowing that the perpetrator has the intent to kill." *Id.*

In *Johnson, 220 Va. at 151–55, 255 S.E.2d at 528–30*, the Supreme Court of Virginia found that an instruction featuring much of the same language as the model instruction was a correct statement of the law. An instruction substantially identical to the model instruction was approved by the Court of Appeals in *Rollston, 11 Va. App. at 538–41, 399 S.E.2d at 825–27.*

☞ ***PRACTICE POINTER:***

Because larceny is a continuing offense, anyone who knows that personal property is stolen and assists in its transportation or disposition is guilty of larceny. *Moehring, 223 Va. at 568, 290 S.E.2d at 892–93* (holding that the evidence was insufficient to establish aiding in the theft or that there was a sharing of intent to deprive the owner of his truck).

☞ ***PRACTICE POINTER:***

Where a defendant has at least been convicted twice previously of a specified violent felony, including convictions of such violations as a principal in the second degree or accessory before the fact, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

ALERTS:

• ***Whether the Defendant Aided the Enterprise.*** There is some question as to whether the defendant must actually aid in some way. Generally, the test is "whether or not [the defendant] was encouraging, inciting, or in some manner offering aid in the commission of the crime." *Jones v. Commonwealth, 208 Va. 370, 372–73, 157 S.E.2d 907, 909 (1967)*; *Hunt, 25 Va. App. at 403, 488 S.E.2d at 676.* That language seems to suggest an offer of aid is sufficient, but the case law shows that an offer of aid was only sufficient in cases involving preconceived plans, *Rasnake, 135 Va. at 708–09, 115 S.E. at 553*; and cases involving constructive presence. *See* Instruction No. 3.150, *Principal in the Second Degree—Presence Defined*; *Washington, 43 Va. App. at 306, 597 S.E.2d at 264; Sutton, 228 Va. at 666–67, 324 S.E.2d at 672.*

• ***Mens Rea and Overt Act.*** The defendant must share the criminal intent of the principal in the first degree or be guilty of some overt act in furtherance of the commission of the felony. *Bass, 31 Va. App. at 389, 523 S.E.2d at 542*; *Augustine v. Commonwealth, 226 Va. 120, 124, 306 S.E.2d 886, 888–89 (1983).* This overt act

must be "knowingly in furtherance of the commission of the crime." *McMorris, 276 Va. at 505, 666 S.E.2d at 351.*

• ***Mere Presence at the Scene.*** In general, mere presence at the crime scene is insufficient to establish that the defendant was a principal in the second degree. *Washington, 43 Va. App. at 306, 597 S.E.2d at 264; Sutton, 228 Va. at 666, 324 S.E.2d at 671.* However, "[P]roof that a person is present at the commission of a crime without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same." *Thomas, 279 Va. at 156, 688 S.E.2d at 234; Foster, 179 Va. 96, 100, 18 S.E.2d 314, 316*; *Pugliese v. Commonwealth, 16 Va. App. 82, 92–95, 428 S.E.2d 16, 24–26 (1993).*

• ***Misdemeanor Cases.*** In misdemeanor cases, Virginia follows the common law. There are no accessories before the fact or principals in the second degree. All involved parties are principals and may be convicted of the misdemeanor. *Wade v. Commonwealth, 56 Va. App. 689, 695, 696 S.E.2d 258, 260 (2010)*; *Spradlin v. Commonwealth, 195 Va. 523, 527, 79 S.E.2d 443, 445 (1954).* See Instruction No. 3.600, *Misdemeanors.*

• ***Unwitting or Innocent Agents.*** One who commits a criminal act through an innocent or unwitting agent is a principal in the first degree. *McAlevy, 270 Va. at 380, 620 S.E.2d at 759*; *Bailey, 229 Va. at 262, 329 S.E.2d at 40.*

• ***Irrelevance of acquittal of Principal in the First Degree.*** The acquittal of the principal in the first degree is irrelevant to the prosecution of a defendant who faces criminal liability as a principal in the second degree. An order of acquittal of the principal in the first degree is, therefore, not admissible. *Ferrell, 62 Va. App. at 150, 743 S.E.2d at 288–89.* It should be noted, however, that a defendant cannot be convicted as a principal in the second degree "unless the evidence establishes the commission of the offense by a principal in the first degree." *Sult v. Commonwealth, 221 Va. 915, 918 (1981).* So, while the conviction of the principal in the first degree is not a condition precedent to the conviction of the principal in the second degree, it still must be proven that the underlying crime was committed by the principal in the first degree.

• ***Punishment Instructions.*** Punishment depends on the crime committed. Therefore, the punishment instruction applicable to the substantive offense should be referred to and read as the punishment instruction for a principal in the second degree.

• ***Aggravated Murder Circumstances.*** A principal in the second degree can be convicted of aggravated murder only in cases of killing for hire or killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise or in the commission of or attempted commission of an act of terrorism. Va. Code Ann. § 18.2-18. In all other instances a principal in the second degree cannot be convicted of aggravated murder but may be convicted of first degree murder. *Johnson, 220 Va. at 149–50, 255 S.E.2d at 527.* However, there may be more than

one principal in the first degree to aggravated murder. See, e.g., *Muhammad, 269 Va. at 481–85, 619 S.E.2d at 33–35*; *Strickler v. Commonwealth, 241 Va. 482, 493–95, 404 S.E.2d 227, 234–36 (1991)*; *Coppola v. Commonwealth, 220 Va. 243, 256–59, 257 S.E.2d 797, 807–08 (1979).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4

Instruction No. 3.150

Principal in the Second Degree—Presence Defined

A person is considered present at the scene of the crime if he was in a place to [incite, encourage, advise or assist] **in the commission of the crime.**

Presence may be actual or constructive. There is constructive presence when several persons set out on a common unlawful purpose and each takes the part assigned to him for the success of the common enterprise.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-18.

Case Authority:

Washington v. Commonwealth, 43 Va. App. 291, 306–08, 597 S.E.2d 256, 263–64 (2004); Sutton v. Commonwealth, 228 Va. 654, 666–67, 324 S.E.2d 665, 671–72 (1985); Grant v. Commonwealth, 216 Va. 166, 168–69, 217 S.E.2d 806, 808 (1975); Whitbeck v. Commonwealth, 210 Va. 324, 326, 170 S.E.2d 776, 778 (1969).

Practice Commentary: Constructive presence is difficult to define. Three examples are: (1) keeping watch, *Whitbeck, 210 Va. at 326–27, 170 S.E.2d at 777–78* (burglary), and *Grant, 216 Va. at 168–69, 217 S.E.2d at 807–08* (robbery); (2) transporting drugs with intent to distribute, *Washington, 43 Va. App. at 306–08, 597 S.E.2d at 263–64*; and (3) exercising continuing, malevolent, intimidating influence on the victim to submit though not present at the time the crime is committed, *Sutton, 228 Va. at 666, 324 S.E.2d at 671* (statutory rape).

Practice Pointer:

Lack of proximity or communication necessarily limits ability to aid or assist in the commission of a crime. If a person is present at the commission of a crime inciting, encouraging, advising, or assisting the act done, he is deemed to be an aider and abettor and is liable as principal, regardless of whether his actions actually assisted the commission of the crime. *Whitbeck, 210 Va. at 326, 170 S.E.2d at 778.*

Alerts:

- *See* Instruction No. 3.100, Principal in the Second Degree

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Principal and Accessory"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 28.2, 28.3

Michie's Jurisprudence, Accomplices and Accessories §§ 1, 2, 4, 5

Instruction No. 3.160

Concert of Action

If there is concert of action with the resulting crime one of its incidental probable consequences, then whether such crime was originally contemplated or not, all who participate in any way in bringing it about are equally answerable and bound by the acts of every other person connected with the consummation of such resulting crime.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-18.

PRINCIPAL CASE AUTHORITY:

Velez-Suarez v. Commonwealth, 64 Va. App. 269, 280–81, 767 S.E.2d 715, 720–21 (2015); *Thomas v. Commonwealth, 279 Va. 131, 157, 688 S.E.2d 220, 234–35 (2010)*; *McMorris v. Commonwealth, 276 Va. 500, 505–07, 666 S.E.2d 348, 350–52 (2008)*; *Davis v. Commonwealth, 36 Va. App. 291, 294–96, 549 S.E.2d 631, 632–33 (2001)*; *Rollston v. Commonwealth, 11 Va. App. 535, 541–44, 399 S.E.2d 823, 827–28 (1991)*; *Spradlin v. Commonwealth, 195 Va. 523, 528, 79 S.E.2d 443, 445 (1954)*.

OTHER RELEVANT DECISIONS:

Shaikh v. Johnson, 276 Va. 537, 546, 666 S.E.2d 325, 329 (2008); *Tweed v. Commonwealth, 36 Va. App. 363, 371, 550 S.E.2d 345, 349 (2001)*; *Charlton v. Commonwealth, 32 Va. App. 47, 51–52, 526 S.E.2d 289, 291–92 (2000)*; *Berkeley v. Commonwealth, 19 Va. App. 279, 283, 451 S.E.2d 41, 43 (1994)*; *Ascher v. Commonwealth, 12 Va. App. 1105, 1126–28, 408 S.E.2d 906, 919–20 (1991)*; *Carter v. Commonwealth, 232 Va. 122, 125–27, 348 S.E.2d 265, 267–68 (1986)*.

PRACTICE COMMENTARY: Each co-actor is responsible for the acts of the others where the crime committed was an incidental probable consequence of a concert of action. *Carter, 232 Va. at 125–27, 348 S.E. 2d at 267–68*.

The language of this instruction is derived from *Spradlin, 195 Va. at 528, 79 S.E.2d at 445*. In *Davis*, the Court of Appeals held it to be a proper statement of the law. *36 Va. App. at 296, 549 S.E.2d at 633*. In *Shaikh*, the Supreme Court approved this instruction. *276 Va. at 546, 666 S.E.2d at 329*.

PRACTICE POINTER:

The concert of action instruction may be appropriate at the penalty phase of a joint trial if the jury is also instructed that defendants who act in concert may be given different punishments. *Davis, 36 Va. App. at 297, 549 S.E.2d at 634*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4, 5, 12; and Conspiracy §§ 4, 5

Instruction No. 3.200

Accessory Before the Fact

An accessory before the fact is one who was not present at the time of the commission of the (name of crime) **but who, before the commission of the** (name of crime), **in some way encouraged, incited or aided in the commission of the** (name of crime) **knowing or having reason to know of the intent of the principal to commit the** (name of crime)**.**

An accessory before the fact is liable for the same punishment as the person who actually committed the crime.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-18.

Principal Case Authority:

Heller v. Commonwealth, 137 Va. 782, 788, 119 S.E. 69, 71–72 (1923).

Other Relevant Decisions:

Ferrell v. Commonwealth, 62 Va. App. 142, 150–51, 743 S.E.2d 284, 289 (2013); Smith v. Commonwealth, 33 Va. App. 65, 70, 531 S.E.2d 608, 610 (2000); Charlton v. Commonwealth, 32 Va. App. 47, 50, 526 S.E.2d 289, 290 (2000); Littlejohn v. Commonwealth, 24 Va. App. 401, 409, 482 S.E.2d 853, 857 (1997); Cirios v. Commonwealth, 7 Va. App. 292, 298–99, 373 S.E.2d 164, 167 (1988); Pancoast v. Commonwealth, 2 Va. App. 28, 33, 340 S.E.2d 833, 836 (1986); McGhee v. Commonwealth, 221 Va. 422, 425–27, 270 S.E.2d 729, 731–32 (1980); Tolley v. Commonwealth, 216 Va. 341, 348, 218 S.E.2d 550, 555 (1975); Hitt v. Commonwealth, 131 Va. 752, 759–60, 109 S.E. 597, 600 (1921); Hawley v. Commonwealth, 75 Va. (1 Matt.) 847, 849 (1880); Rasnick v. Commonwealth, 4 Va. (2 Va. Cas.) 356, 358–59 (1823).

Practice Commentary: The earliest reference to accessory before the fact is in *Rasnick, 4 Va. at 358–59*. The nature of the planning, counseling, encouraging, contriving, instigating, or advising necessary for accessory before the fact liability is set out in *Heller, 137 Va. at 787–88, 119 S.E. at 71*, and *Hitt, 131 Va. at 759–60, 109 S.E. at 600*. These were modified to read in the instruction as planning, advising, or assisting in the commission of the crime. The type of actions necessary, i.e., speaking, gesturing, signaling, or acting in some way, were borrowed from the related offense of principal in the second degree. *Brown v. Commonwealth, 130 Va. 733, 736–37, 107 S.E. 809, 810–11 (1921)*. The class of the offense depends on the mens rea of the actor; therefore, if one is an accessory before the fact of murder with malice, but the crime is committed in the heat of passion, the accessory before the fact is still liable for murder. *Hawley, 75 Va. at 851*. An accessory before the fact can be convicted of aggravated murder only in cases of killing for hire, killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise, or killing while engaged in the commission of or attempted commission of an act of terrorism. Va. Code Ann. § 18.2-18.

Evidence of Knowledge of the Principal's Intent; Encouragement. The evidence must establish that the accessory before the fact shared the criminal intent of the principal. To be guilty as an accessory before the fact, the defendant must either know, or have reason to know, of the principal's criminal intention. Further, the defendant must intend to encourage, incite, or aid the principal's commission of the crime. The amount of incitement or encouragement is irrelevant if the encouragement in fact induces the principal to commit the offense. *Cirios, 7 Va.*

App. at 298, 373 S.E.2d at 167; *McGhee, 221 Va. at 427, 270 S.E.2d at 732–33.*

☞ ***PRACTICE POINTER:***

An instigator of a crime is an accessory before the fact even though he did not participate in the planning of the crime, or was unaware of the precise time or place of the crime's commission or of the precise method employed by the principal. A contrary holding would allow instigators to escape liability for their actions by removing themselves from the planning of crimes they have incited. *McGhee, 221 Va. at 427, 270 S.E.2d at 732.*

ALERTS:

• The terms aided and abetted are sometimes applied to principals in the second degree. *Muhammad v. Commonwealth, 269 Va. 451, 482, 619 S.E.2d 16, 33 (2005).* In addition, the crime of accessory before the fact traditionally requires absence at the act. *Tolley v. Commonwealth, 216 Va. 341, 348, 218 S.E.2d 550, 555 (1975).* Thus, the sole distinction between an accessory before the fact and a principal in the second degree is that an accessory must be absent when the crime is committed and a principal in the second degree must be present, either actually or constructively. *McGhee, 221 Va. at n.2–3.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4, 5

Instruction No. 3.300

Accessory After the Fact

The defendant is charged with being an accessory after the fact to the crime of (name of crime)**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That some person other than defendant committed the crime of (name of crime)**; and**

(2) That the (name of crime) **was completed; and**

(3) That the defendant knew or should have known that the person had committed the (name of crime)**; and**

(4) That the defendant comforted, relieved, hid, or in any other way assisted the person who committed the (name of crime) with the intent of helping that person escape or delay capture, prosecution or punishment.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P3.300(a)

Accessory After the Fact—Homicide Punishable as a Class 1 or 2 Felony

You have found the defendant guilty of being an accessory after the fact to the crime of (name of homicide that is punishable as a Class 1 or 2 felony)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-19(i).

CASE AUTHORITY:

Suter v. Commonwealth, 67 Va. App. 311, 320, 796 S.E.2d 416, 421 (2017); Commonwealth v. Dalton, 259 Va. 249, 253–54, 524 S.E.2d 860, 862–63 (2000); Powell v. Commonwealth, 31 Va. App. 167, 171–72, 521 S.E.2d 787, 789 (1999); Redman v. Commonwealth, 25 Va. App. 215, 219, 487 S.E.2d 269, 271 (1997); Sheppard v. Commonwealth, 250 Va. 379, 393, 464 S.E.2d 131, 140 (1995); Manley v. Commonwealth, 222 Va. 642, 644–45, 283 S.E.2d 207, 208 (1981); Wren v. Commonwealth, 67 Va. (26 Gratt.) 952, 956 (1875).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-19 increases from a Class 1 misdemeanor to a Class 6 felony the penalty for accessories after the fact "in the case of homicide offenses punishable as a Class 1 or Class 2 felony." Va. Code Ann. § 18.2-19(i). The instruction above therefore should be used for accessories after the fact only where a completed homicide offense is punishable as a Class 1 or 2 felony. In the case of all other completed felonies, Instruction No. P3.300(b) should be used.

A person cannot be found guilty of being an accessory after the fact to a felony if he or she is the husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, or servant of the person who committed the felony. Va. Code Ann. § 18.2-19.

PRACTICE POINTER:

In *Dalton*, the Court concluded that the crime of accessory after the fact is not a lesser included offense of murder. Based on that analysis, the Court held that neither the Commonwealth nor an accused is entitled to an accessory after the fact instruction unless the accused has been charged with that crime. *259 Va. at 254–55, 524 S.E.2d at 863.*

ALERTS:

• The common law requires the actual crime to have been completed at the time an accessory gives aid to the principal. For example, in *Suter v. Commonwealth*, the Court reasoned that "a person cannot, as a matter of law, be convicted as an accessory after the fact to a murder because of aid given after the murderer's acts but before the victim's death." *Suter, 67 Va. App. at 320, 796 S.E.2d at 421.* Thus, an accessory after the fact instruction that fails to set forth that the felony must be completed must be refused. *Sheppard, 250 Va. at 393, 464 S.E.2d at 140.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4, 5

Instruction No. P3.300(b)

Accessory After the Fact—Other Felonies

You have found the defendant guilty of being an accessory after the fact to the crime of (name of felony that is not a homicide punishable as a Class 1 or 2 felony).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-19(ii).

CASE AUTHORITY:

Commonwealth v. Dalton, 259 Va. 249, 253–54, 524 S.E.2d 860, 862–63 (2000); Powell v. Commonwealth, 31 Va. App. 167, 171–72, 521 S.E.2d 787, 789 (1999); Redman v. Commonwealth, 25 Va. App. 215, 219, 487 S.E.2d 269, 271 (1997); Sheppard v. Commonwealth, 250 Va. 379, 393, 464 S.E.2d 131, 140 (1995); Manley v. Commonwealth, 222 Va. 642, 644–45, 283 S.E.2d 207, 208 (1981); Wren v. Commonwealth, 67 Va. (26 Gratt.) 952, 956 (1875).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-19 increases the punishment for accessory after the fact "in the case of a homicide offense that is punishable as a Class 1 or Class 2 felony." Va. Code Ann. § 18.2-19(i). The instruction above should be used for accessory after the fact in the case of all other underlying substantive felonies. Va. Code Ann. § 18.2-19(ii).

A person cannot be found guilty of being an accessory after the fact to a felony if he or she is the husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, or servant of the person who committed the felony. Va. Code Ann. § 18.2-19.

☞ ***PRACTICE POINTER:***

In *Dalton*, the Court concluded that the crime of accessory after the fact is not a lesser included offense of murder. Based on that analysis, the Court held that neither the Commonwealth nor the defendant is entitled to an accessory-after-the-fact instruction unless the defendant has been charged with that crime. *259 Va. at 254–55, 524 S.E.2d at 863.*

ALERTS:

• The common law requires the actual crime to have been completed at the time an accessory gives aid to the principal. For example, in *Suter v. Commonwealth*, the Court reasoned that "a person cannot, as a matter of law, be convicted as an accessory after the fact to a murder because of aid given after the murderer's acts but before the victim's death." *Suter, 67 Va. App. at 320, 796 S.E.2d at 421.* Thus, an accessory after the fact instruction that failed to set forth an essential element that the felony must be completed must be refused. *Sheppard, 250 Va. at 393, 464 S.E.2d at 140.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4, 5

Instruction No. 3.400

Testimony of Accomplice

(Name of person) **has testified that he was an accomplice in the commission of the crime charged in the indictment. While you may find your verdict upon his uncorroborated testimony, you should consider such testimony with great care and you are cautioned as to the danger of convicting the defendant upon the uncorroborated testimony of an accomplice. Nevertheless, if you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, the defendant may be convicted upon the uncorroborated evidence of an accomplice.**

Sources & Authority

Governing Statute:

None.

Principal Case Authority:

Via v. Commonwealth, 288 Va. 114, 114–15, 762 S.E.2d 88, 88–89 (2014); Smith v. Commonwealth, 218 Va. 455, 456–57, 237 S.E.2d 776, 777 (1977); Dillard v. Commonwealth, 216 Va. 820, 821–22, 224 S.E.2d 137, 138–39 (1976); Jones v. Commonwealth, 111 Va. 862, 868, 69 S.E. 953, 955 (1911).

OTHER RELEVANT DECISIONS:

Holloman v. Commonwealth, 65 Va. App. 147, 175, 775 S.E.2d 434, 448, (2015); Bolton v. Commonwealth, 19 Va. App. 376, 381, 451 S.E.2d 687, 690–91 (1994); Cardwell v. Commonwealth, 248 Va. 501, 511–12, 450 S.E.2d 146, 153 (1994); Clark v. Commonwealth, 219 Va. 237, 242–43, 247 S.E.2d 376, 379–80 (1978); Allard v. Commonwealth, 218 Va. 988, 989–90, 243 S.E.2d 216, 217 (1978).

Practice Commentary: This Instruction is a cautionary instruction applicable only when the accomplice's testimony is uncorroborated by material facts tending to connect the accused with the crime. *Dillard, 216 Va. at 823–24, 224 S.E.2d at 140.* In *Via*, the Supreme Court of Virginia observed that the language of this instruction correctly states the law and should be given if a witness whose testimony is at issue is an accomplice and if his or her testimony is uncorroborated. 288 Va. at 115, 762 S.E.2d at 89: *Jones, 111 Va. at 868, 69 S.E. at 955.*

Who qualifies as an "Accomplice":

"The test for whether a witness is an accomplice is 'whether he could be indicted for the same offense.' " Via, 288 Va. at 115, 672 S.E.2d at 89. In *Via*, the court stated that neither the fact that the witness was not charged with any crime relating to the offenses being tried, nor the Commonwealth's conclusion that the witness lacked criminal intent, was relevant in determining whether the witness could have been indicted for pertinent offenses and was thus an accomplice. *288 Va. at 115–16, 762 S.E.2d at 89.*

Whether There Is Corroboration:

The cautionary instruction should be granted when accomplice testimony is uncorroborated and should be refused when such testimony is corroborated. *Dillard, 216 Va. at 822, 224 S.E.2d at 139.* The determination of whether accomplice testimony has or has not been sufficiently corroborated to warrant the refusing or granting of a cautionary instruction is a legal question for the court, not a factual question for the jury. *Dillard, 216 Va. at 824, 224 S.E.2d at 140.* In answering that question, the court should apply the standard of whether "the testimony of an accomplice is corroborated in material facts which tend to connect the defendant with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony . . . ." *Id. at 823, 224 S.E.2d at 140.* The corroborative evidence, standing alone, need not be sufficient either to support a conviction or to

establish all the essential elements of an offense. A cautionary instruction may be refused where other evidence corroborates material facts which tend to connect the defendant with the crime. *Holloman, 65 Va. App. at 175, 775 S.E.2d at 448.* However, "[a]ccomplice testimony cannot be corroborated by the testimony of another accomplice." *Id. at 174, 775 S.E.2d at 448.*

In determining whether corroboration was sufficient in *Dillard*, the Court held that it was not error to refuse the cautionary instruction because the accomplice's testimony "was corroborated in so much of its material facts which tended to connect the defendant with the crimes charged that the jury was warranted in crediting the truth of the testimony." *216 Va. at 826, 224 S.E.2d at 142*; *Allard, 218 Va. at 989–90, 243 S.E.2d at 217.* Likewise, in *Clark*, the Court said that the jury was not entitled to a cautionary instruction about the testimony of two accomplices because their testimony was corroborated by the testimony of the defendant himself and other non-accomplices. *Clark, 219 Va. at 242–43, 247 S.E.2d at 379–80; Cardwell, 248 Va. at 512, 450 S.E.2d at 153* ("an accomplice's testimony can be corroborated by an accused's admissions"); In contrast, the Court in *Smith* found the trial court erred in refusing to give a cautionary instruction since the accomplice's testimony was not corroborated because the victim could not identify the defendant and no other evidence tended to connect the defendant to the crime. *218 Va. at 456–57, 237 S.E.2d at 777.*

In *Jones*, the Supreme Court, synthesizing a number of early cases and other authorities, stated as follows:

> While the rule of decision in this jurisdiction is that the jury, as triers of fact, may, if they see proper to do so, convict upon the uncorroborated testimony of an accomplice alone, nevertheless, the principle is well settled that the evidence of an accomplice must be received and acted upon by the jury with great caution. The source of such evidence is tainted, and the danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others is so strong, that it is the duty of the court to warn the jury against the danger of convicting upon their uncorroborated testimony. From these considerations, the generally accepted rule is, that "If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other. . . ." 1 Greenleaf on Evidence § 381 (15th ed. 1892); Woods v. Commonwealth, 86 Va. 929, 931, 11 S.E. 798 (1890); Byrd v. Commonwealth, 4 Va. (2 Va. Cas.) 490, 493 (1826). [W]e believe the correct and safe rule is to require that corroboration shall come from a source other than another accomplice. Moreover, the corroboration or confirmation must relate to some fact (or facts) which goes to establish the guilt of the accused.

111 Va. at 868–69, 69 S.E. at 955.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 60.6

MICHIE'S JURISPRUDENCE, Accomplices and Accessories § 11, 12

Instruction No. 3.500

Principal in the Second Degree, Accessory Before the Fact—Illustration

The defendant is charged with the crime of burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the dwelling house of another was broken into and entered without permission; and

(2) That the breaking and entering was done in the nighttime; and

(3) That it was done with the intent to commit [larceny; (name of crime)]**; and**

(4) That the defendant was [a principal in the second degree; an accessory before the fact]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime as charged, then you shall find the defendant not guilty.

Instruction No. 3.500

(1) That the dwelling house of another was [describe]; and

(2) That it was broken and entered [or entered without permission]; and

(3) That it was done with the intent to commit [larceny; (name of crime)]; and

(4) That the defendant was [a principal in the second degree; an accessory before the fact].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the [crime charged], then you shall find the defendant guilty; but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime charged, then you shall find the defendant not guilty.

Instruction No. P3.500

Principal in the Second Degree, Accessory Before the Fact—Illustration

You have found the defendant guilty of the crime of burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-18.

CASE AUTHORITY:

Rollston v. Commonwealth, 11 Va. App. 535, 539–41, 399 S.E.2d 823, 825–26 (1991); *Grant v. Commonwealth, 216 Va. 166, 168–69, 217 S.E.2d 806, 808 (1975).*

PRACTICE COMMENTARY:

The underlying substantive crime of burglary has been used to demonstrate the appropriate format for a Principal in the Second Degree or Accessory after the Fact instruction. After listing the elements of the underlying substantive offense (as is done in Elements (1)–(3) of this illustration), use Element (4) from the illustration as the final element.

ALERTS:

- None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.2, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories § 1, 2, 4, 5

Instruction No. 3.600

Misdemeanors

Every person who is present at the commission of a misdemeanor, aiding the act by words, gestures, signals, or actions, is liable for the same punishment as if he actually committed the crime. Presence and consent alone are not sufficient. It must be shown that the defendant intended his words, gestures, signals, or actions to in some way aid the person committing the crime to commit it.

Presence includes being at some convenient distance from the actual place of commission of the crime, if the defendant at such distance was in fact aiding the act by words, gestures, signals, or actions.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Wade v. Commonwealth, 56 Va. App. 689, 695, 696 S.E.2d 258, 260 (2010); Spradlin v. Commonwealth, 195 Va. 523, 526–29, 79 S.E.2d 443, 445–46 (1954); Hodge v. City of Winchester, 153 Va. 904, 907–08, 150 S.E. 392, 394 (1929).

PRACTICE COMMENTARY: In misdemeanor cases, Virginia follows the common law. There are no accessories before the fact or principals in the second degree. All involved parties are principals and may be convicted of the misdemeanor. *Wade, 56 Va. at 695, 696 S.E.2d at 260.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Principal and Accessory"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 28.1, 28.3

MICHIE'S JURISPRUDENCE, Accomplices and Accessories §§ 1, 2, 4, 5, 8

CHAPTER 4

ABDUCTION (KIDNAPPING)

Scope Note

Instruction No. 4.100 Abduction—General

Instruction No. P4.100 Abduction—General

Instruction No. 4.200 Abduction—For Value or Immoral Purpose

Instruction No. P4.200 Abduction—For Value or Immoral Purpose

Instruction No. 4.300 Abduction—By Parent Within the Commonwealth

Instruction No. P4.300 Abduction—By Parent Within the Commonwealth

Instruction No. 4.400 Abduction—By Parent Outside the Commonwealth

Instruction No. P4.400 Abduction—By Parent Outside the Commonwealth

Instruction No. 4.500 Violation of Custody/Visitation Order Within the Commonwealth

Instruction No. P4.500 Violation of Custody/Visitation Order Within the Commonwealth

Instruction No. 4.600 Violation of Custody/Visitation Order Outside the Commonwealth

Instruction No. P4.600 Violation of Custody/Visitation Order Outside the Commonwealth

SCOPE NOTE

This chapter covers the major crimes included in Chapter 4, Article 3 of Title 18.2, Kidnapping and Related Offenses. Under these provisions, the terms "abduction" and "kidnapping" are used synonymously. Va. Code Ann. § 18.2-47(C).

Instruction No. 4.100, based on Va. Code Ann. § 18.2-47(A), is a general instruction on abduction. Abduction, except as otherwise provided, is a Class 5 felony. See Va. Code Ann. § 18.2-47(C).

Instruction No. 4.200, based on Va. Code Ann. § 18.2-48, deals with the crime of abduction with the intent to extort money or pecuniary benefit or for an enumerated immoral purpose. Violation of this section is defined as a Class 2 felony, with an additional suspended sentence being mandated if a particular intent is proven.

Instruction Nos. 4.300 and 4.400 are based on Va. Code Ann. § 18.2-47(D). Va. Code Ann. § 18.2-47(D) proscribes abduction by the parent of a child and prescribes the punishment thereof. If such abduction is punishable by contempt of court in any pending proceeding, then the offense is punishable as a Class 1 misdemeanor in addition to being punishable as contempt of court. If, however, the person abducted is removed from the Commonwealth, the offense is punishable as a Class 6 felony in addition to being punishable by contempt of court.

Instruction Nos. 4.500 and 4.600 are based on Va. Code Ann. § 18.2-49.1. Va. Code Ann. § 18.2-49.1 defines and punishes the crime of withholding a child in violation of a court order. Punishment for this offense varies depending on whether the child is removed from the Commonwealth and whether a second or subsequent offense is committed within particular temporal durations.

Va. Code Ann. § 18.2-49 and 18.2-50 define other crimes for which instructions are not provided. For the most part, however, these crimes fall into the categories of threats, attempts, and aiding and abetting. Useful instructions pertaining to these subjects may be found elsewhere under those headings. Similarly, a model instruction on the duty to disclose information and to assist law enforcement officers, as mandated by Va. Code Ann. § 18.2-50, may be found with instructions on interference with administration of justice. See Chapter 35.

Although no instruction is provided for Va. Code Ann. § 18.2-48.1, that section makes abduction by a prisoner in a state, local, or community correctional facility, or in the custody of an employee thereof, a Class 3 felony.

Where a defendant has previously been convicted of two violent felonies, a defendant's sentence may be subject to enhancement under Va. Code Ann. § 19.2-297.1.

Instruction No. 4.100

Abduction—General

The defendant is charged with the crime of abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by [force; intimidation; deception] **did** [seize; take; transport; detain; hide] (name of person)**; and**

(2) That the defendant did so with the intent [to deprive (name of person) of his personal liberty; to withhold or conceal (name of person) from (name of person or authority legally entitled to his charge)]**; and**

(3) That the defendant acted without legal justification or excuse.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.100

Abduction—General

You have found the defendant guilty of the crime of abduction.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-47(A).

PRINCIPAL CASE AUTHORITY:

Commonwealth v. Herring, 288 Va. 59, 74–76, 758 S.E.2d 225, 233–35 (2014); *Lawlor v. Commonwealth, 285 Va. 187, 224–27, 738 S.E.2d 847, 868–69 (2013).*

OTHER RELEVANT DECISIONS:

Vay v. Commonwealth, 67 Va. App. 236, 255–56, 795 S.E.2d 495, 504 (2017); *Epps v. Commonwealth, 66 Va. App. 393, 402–04, 785 S.E.2d 792, 797 (2016)*; *Chatman v. Commonwealth, 61 Va. App. 618, 629–31, 739 S.E.2d 245, 250–51 (2013)*; *Burton v. Commonwealth, 281 Va. 622, 626, 708 S.E.2d 892, 894 (2011)*; *Smith v. Commonwealth, 56 Va. App. 711, 720-24, 697 S.E.2d 14, 18-20 (2010)*; *Clanton v. Commonwealth, 53 Va. App. 561, 567, 673 S.E.2d 904, 907 (2009)*; *Pryor v. Commonwealth, 48 Va. App. 1, 5–8, 628 S.E.2d 47, 49–50 (2006)*; *Jerman v. Director of the Dep't Corr., 267 Va. 432, 439–40, 593 S.E.2d 255, 259-60 (2004)*; *Hoyt v. Commonwealth, 44 Va. App. 489, 492-97, 605 S.E.2d 755, 756-59 (2004)*; *Taylor v. Commonwealth, 260 Va. 683, 688-89, 537 S.E.2d 592, 595 (2000)*; *Smith v. Commonwealth, 33 Va. App. 65, 70–72, 531 S.E.2d 608, 610–11 (2000)*; *Johnson v. Commonwealth, 13 Va. App. 515, 517, 412 S.E.2d 731, 732 (1992)*; *Coram v. Commonwealth, 3 Va. App. 623, 625–26, 352 S.E.2d 532, 533–34 (1987)*; *Simms v. Commonwealth, 2 Va. App. 614, 617–18, 346 S.E.2d 734, 735–36 (1986)*; *Brown v. Commonwealth, 230 Va. 310, 312–14, 337 S.E.2d 711, 712–14 (1985)*; *Scott v. Commonwealth, 228 Va. 519, 524–26, 323 S.E.2d 572, 575–76 (1984).*

PRACTICE COMMENTARY:

Statute Replaces the Common Law Offense. Under Va. Code Ann. § 18.2-47(C), kidnapping and abduction are now the same crime. Va. Code Ann. § 18.2-47 supersedes the common law definition of kidnapping. *Clanton, 53 Va. App. at 567, 673 S.E.2d at 907*; *Scott, 228 Va. at 526, 323 S.E.2d at 576.* Although abduction often occurs by force, the statute also expressly provides that it may occur by intimidation or by deception. Va. Code Ann. § 18.2-47(A).

The Supreme Court of Virginia has specifically approved this instruction. *Fitzgerald v. Commonwealth, 223 Va. 615, 632–33, 292 S.E.2d 798, 808 (1982).*

Asportation and the Incidental Detention Doctrine. Under Va. Code Ann. § 18.2-47, asportation of the victim is no longer a necessary element of the crime. *Simms, 2 Va. App. at 617–18, 346 S.E.2d at 735–36*; *Scott, 228 Va. at 526, 323 S.E.2d at 576.* In abolishing the requirement of asportation, the General Assembly "did not intend to make the kind of restraint which is an intrinsic element of crimes such as rape, robbery, and assault a criminal act, punishable as a separate offense." *Hoyt, 44 Va. App. at 492, 605 S.E.2d at 756*; *Brown, 230 Va. at, 314, 337 S.E.2d at 713.*

Regarding the incidental detention doctrine, the Court of Appeals has concluded

that:

> [O]ne accused of abduction by detention and another crime involving restraint of the victim, both growing out of a continuing course of conduct, is subject upon conviction to separate penalties for separate offenses only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime.

Hoyt, 44 Va. App. at 493, 605 S.E.2d at 757; *Brown, 230 Va. at, 314, 337 S.E.2d at 713–14*. In doing so, the court outlined four relevant factors in ascertaining whether abduction is merely incidental to the commission of a separate crime or whether a defendant may appropriately be convicted of abduction as an independent offense: (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense. *Hoyt, 44 Va. App. at 494-95, 605 S.E.2d at 757–58.*

If the defendant is not convicted of the crime charged in conjunction with the abduction, such as robbery or rape, the double jeopardy concerns underlying *Brown* and *Hoyt* do not exist, and the incidental detention doctrine does not apply. Therefore, even though the abduction was incidental to the robbery, rape, or other crime, the defendant may be convicted of abduction if he is not convicted of the separate offense. *Walker v. Commonwealth, 272 Va. 511, 516, 636 S.E.2d 476, 479 (2006).*

Whether an abduction is merely incidental to another crime "is a question of law to be determined by the court." *Lawlor, 285 Va. at 229, 738 S.E.2d at 871.* Therefore, since incidental detention is a question of law, "a jury instruction can never be appropriate because . . . the trial court, and not the jury, must resolve [such an issue]." *Vay, 67 Va. App. at 255–58, 795 S.E.2d at 504-05.*

For cases applying the incidental detention doctrine, see *Lawlor, 285 Va. at 224–27, 738 S.E.2d at 868–69*; *Chatman, 61 Va. App. at 630-31, 739 S.E.2d at 251*; *Smith, 56 Va. App. at 723–24, 697 S.E.2d at 19–20*; *Hoyt, 44 Va. App. at 493–97, 605 S.E.2d at 757–59*; *Brown, 230 Va. at 314–16, 337 S.E.2d at 713–15.* See also *Fields v. Commonwealth, 48 Va. App. 393, 398–401, 632 S.E.2d 8, 10–11 (2006)*; *Wiggins v. Commonwealth, 47 Va. App. 173, 182–90, 622 S.E.2d 774, 778–82 (2005).*

Justification or Excuse. For a discussion of justification or excuse, see *Taylor, 260 Va. at 689–90, 537 S.E.2d at 595–96.* A mistaken belief by the defendant that he had legal justification to seize a person by force does not constitute a defense to abduction. *Collins v. Commonwealth, 283 Va. 263, 271–72, 720 S.E.2d 530, 533–34 (2012).*

Intent. The requisite intent under the statute is satisfied with a showing that the defendant intended either to deprive the victim of his or her personal liberty or to

withhold or conceal the victim from a person or authority lawfully entitled to his or her charge. This intent may be inferred from the acts of the defendant. *Herring, 288 Va. at 74–76, 758 S.E.2d at 233–35.* When the charge involves detention by deception, the Commonwealth must prove that the detention was done with the intent to deprive the victim of her personal liberty. *Burton, 281 Va. at 627–28, 708 S.E.2d at 894–95.*

Lesser Included Offenses. An instruction under Va. Code Ann. § 18.2-47(A) was refused as a lesser included offense of Va. Code Ann. § 18.2-48 (abduction with intent to extort money or for immoral purposes) where there was no evidence to support the lesser charge of general abduction. *Cortner v. Commonwealth, 222 Va. 557, 560–62, 281 S.E.2d 908, 910–11 (1981).*

Attempted rape is not a lesser included offense of abduction. *Simms, 2 Va. App. at 617, 346 S.E.2d at 735.*

Double Jeopardy, Assault, Murder, and Abduction. Double jeopardy does not preclude a person who has been convicted of assault from being convicted of abduction arising out of the same occurrence. Cf. *Epps, 66 Va. App. at 402–04, 785 S.E.2d at 796–97*; *Johnson, 13 Va. App. at 517–18, 412 S.E.2d at 732.* An abduction preceding a murder may lead to separate convictions for each. *Pryor, 48 Va. App. at 8, 628 S.E.2d at 50.*

☞ ***PRACTICE POINTER:***

Abduction for which no punishment is otherwise prescribed shall be punished as a Class 5 felony. Va. Code Ann. § 18.2-47(C). But see Va. Code Ann. § 18.2-47(D) (making abduction committed by a parent punishable as a Class 1 misdemeanor, and a Class 6 felony if the parent removes the child from the Commonwealth).

ALERTS:

If the defendant is the parent of the abducted child, see Instruction Nos. 4.300, Abduction—By Parent Within the Commonwealth and 4.400, Abduction—By Parent Outside the Commonwealth. If a child is withheld from a parent in violation of a court order, see, Instruction No. 4.500, Violation of Custody/Visitation Order Within the Commonwealth and Instruction No. 4.600, Violation of Custody/ Visitation Order Outside the Commonwealth. Abduction by a prisoner in a state, local, or community correctional facility, or in the custody of an employee thereof, in violation of Va. Code Ann. § 18.2-48.1, is a Class 3 felony.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Abduction"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 7.1–7.3

MICHIE'S JURISPRUDENCE, Abduction and Kidnapping §§ 1-3

Instruction No. 4.200

Abduction—For Value or Immoral Purpose

The defendant is charged with the crime of abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant by** [force; intimidation; deception] **did** [seize; take; transport; detain; hide] (name of person)**; and**

(2) **That the defendant did so with the intent** [to deprive (name of person) of his personal liberty; to withhold or conceal (name of person) from (name of person or authority legally entitled to his charge)]**; and**

(3) **That** [the defendant did so with the intent to obtain money or other benefit of value; the defendant did so with the intent to sexually molest (name of person); (name of person) was under the age of sixteen (16) years and the abduction was for the purpose of prostitution or living together without being married; that the abduction was for the purpose of prostitution; that the abduction was of a minor for the purpose of manufacturing child pornography]**; and**

(4) **That the defendant acted without legal justification or excuse.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.200

Abduction—For Value or Immoral Purpose

You have found the defendant guilty of the crime of abduction.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than twenty (20) years; or

(2) Imprisonment for life or for a specific term, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-48.

Principal Case Authority:

Fitzgerald v. Commonwealth, 223 Va. 615, 632–33, 292 S.E.2d 798, 808 (1982).

Other Relevant Decisions:

Vay v. Commonwealth, 67 Va. App. 236, 248–54, 795 S.E.2d 495, 500–03 (2017); *Smith v. Commonwealth, 56 Va. App. 711, 720–24, 697 S.E.2d 14, 18–20 (2010)*; *Fields v. Commonwealth, 48 Va. App. 393, 397–401, 632 S.E.2d 8, 10–11 (2006)*; *Barnes v. Commonwealth, 234 Va. 130, 136–37, 360 S.E.2d 196, 201 (1987)*; *Brown v. Commonwealth, 230 Va. 310, 313–14, 337 S.E.2d 711, 713–14 (1985)*; *Cortner v. Commonwealth, 222 Va. 557, 560–62, 281 S.E.2d 908, 909–11 (1981)*; *Krummert v. Commonwealth, 186 Va. 581, 584–85, 43 S.E.2d 831, 832–33 (1947)*; *Kent v. Commonwealth, 165 Va. 840, 841, 183 S.E. 177, 177 (1936).*

Practice Commentary: The Supreme Court of Virginia approved this instruction in *Fitzgerald, 223 Va. at 632–33, 292 S.E.2d at 808.*

The defendant cannot be convicted if he or she acted with legal justification or excuse. However, Virginia's appellate courts have not delineated to what extent the defendant must bear the burden of producing evidence to establish a justification or excuse, and to what extent the burden rests with the prosecution as a part of its case in chief to negate any justification or excuse. See *Taylor v. Commonwealth, 260 Va. 683, 689–90, 537 S.E.2d 592, 595–96 (2000).*

Differentiating Abduction from Abduction with Intent to Defile. "The distinguishing feature between the charge of abduction and abduction with intent to defile is the specific intent required by the latter." *Crawford v. Commonwealth, 281 Va. 84, 102, 704 S.E.2d 107, 118 (2011).*

Harmonization of Kidnapping and Abduction. Kidnapping and abduction are now the same crime. See Sources & Authority statement for Instruction 4.100, Abduction—General.

Pecuniary Benefit. For clarity, pecuniary benefit has been rephrased in this instruction as "benefit of value." Pecuniary benefit (benefit of value) is given an expansive meaning in the context of Va. Code Ann. § 18.2-48, in that it means "not only money, but everything that can be valued in money." *Krummert, 186 Va. at 584, 43 S.E.2d at 832.* For instance, forcibly obtaining a ride toward defendant's desired destination was sufficient pecuniary benefit to justify conviction. *Krummert, 186 Va. at 584–585, 43 S.E.2d at 832–33.* Where robbers in possession of stolen money and drugs fled the scene using a victim as a shield there was sufficient pecuniary benefit to justify conviction. *Cortner, 222 Va. at 561, 281 S.E.2d at 910.* Pecuniary benefit has been established where the defendant induced the victim by deception to drive to Washington, D.C. so that he could murder her in order to obtain her property. *Kent, 165 Va. at 841–42, 183 S.E. at 177–78.* Abducting a

person as means of gaining access to the scene, or otherwise facilitating the commission of an intended robbery, is abduction for pecuniary benefit. *Barnes, 234 Va. at 137, 360 S.E.2d at 201.*

☞ ***PRACTICE POINTER:***

Although the lesser included instruction was not granted, the Court has indicated that general abduction under Va. Code Ann. § 18.2-47 is a lesser included offense of Va. Code Ann. § 18.2-48. *Cortner, 222 Va. at 560–62, 281 S.E.2d at 909–11.*

ALERTS:

• "It is not necessary that the criminal actually succeed in realizing his desired gain" to be convicted of abduction. All that is required is that he or she undertake the abduction with the intent to extort money or otherwise obtain a pecuniary benefit. *Barnes, 234 Va. at 137, 360 S.E.2d at 201.* Accordingly, "[a]bducting a person as a means of gaining access to the scene or otherwise facilitating the commission of an intended robbery constitutes an abduction for pecuniary benefit." *Wiggins v. Commonwealth, 47 Va. App. 173, 180 n.4, 622 S.E.2d 774, 777 n.4 (2005).*

• Va. Code Ann. § 18.2-49 addresses the crime of threatening, attempting, or assisting the crimes of abduction set forth in Va. Code Ann. § 18.2-48. This offense is punishable as a Class 5 felony.

• Va. Code Ann. § 18.2-48(iii), as amended, includes in the class of victims of abduction for the purpose of concubinage or prostitution a child of any gender under sixteen (16) years of age. Va. Code Ann. § 18.2-49(3), which addresses threatening, attempting, or assisting with such abduction, similarly applies to a child of any gender under sixteen (16) years of age.

• In any case where the jury recommends a term of confinement less than life imprisonment for a violation of Va. Code Ann. §§ 18.2-48(ii), (iii), (iv), or (v), the judge must impose, in addition to any active sentence, a suspended sentence of no less than 40 years, which sentence must be suspended for the remainder of the defendant's life subject to revocation by the court. Va. Code Ann. § 18.2-48.

• Va. Code Ann. § 18.2-48.1 makes abduction by a prisoner in a state, local, or community correctional facility, a prisoner in the custody of an employee thereof, or a prisoner who has escaped from any such facility or person in charge of such prisoner, a Class 3 felony.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Abduction"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 7.1–7.3

MICHIE'S JURISPRUDENCE, Abduction and Kidnapping §§ 1–3

Instruction No. 4.300

Abduction—By Parent Within the Commonwealth

The defendant is charged with the crime of abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant is the parent of (name of child)**; and**

(2) That the defendant by [force; intimidation; deception] **did** [seize; take; transport; detain; hide] (name of child)**; and**

(3) That the defendant did so with the intent [to deprive (name of child) of his personal liberty; to withhold or conceal (name of child) from (name of person, authority, or institution legally entitled to his charge)]**; and**

(4) That the defendant acted without legal justification or excuse and in violation of a court order issued in a then pending proceeding.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.300

Abduction—By Parent Within the Commonwealth

You have found the defendant guilty of the crime of abduction.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-47(D).

CASE AUTHORITY:

Diehl v. Commonwealth, 9 Va. App. 191, 194, 385 S.E.2d 228, 230 (1989); Bennett v. Commonwealth, 8 Va. App. 228, 231–33, 380 S.E.2d 17, 19–20 (1989).

PRACTICE COMMENTARY: The defendant cannot be convicted if he or she acted with legal justification or excuse. *Taylor v. Commonwealth, 260 Va. 683, 689–90, 537 S.E.2d 592, 595–96 (2000).*

The terms "kidnapping" and "abduction" are synonymous in the Code. Va. Code Ann. § 18.2-47(C).

A person "lawfully entitled to his or her charge" is not limited to a custodial parent or a person with legal custody but may include a person such as another relative, a teacher, or a day care provider to whom temporary physical custody has been given by the custodian. *Bennett, 8 Va. App. at 231–32, 380 S.E.2d at 19–20.*

☞ ***PRACTICE POINTER:***

If there is no court proceeding pending at the time of the offense wherein the parent could be held in contempt, Va. Code Ann. § 18.2-47(D) does not apply and the parent can be prosecuted under Va. Code Ann. § 18.2-47(A). *Diehl, 9 Va. App. at 194, 385 S.E.2d at 230.*

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 18.2-49.1 addresses violations of court orders pertaining to custody and visitation. See Instruction No. 4.500, Violation of Custody/Visitation Order Within the Commonwealth and Instruction No. 4.600, Violation of Custody/Visitation Order Outside the Commonwealth.

ALERTS:

• Va. Code Ann. § 18.2-47(D) applies to an abduction committed by a parent, which is also punishable by contempt in a pending court proceeding. It is a Class 1 misdemeanor if the abducted child remains in the Commonwealth and a Class 6 felony if the abducted child is removed from the Commonwealth. For the former, see Instruction No. 4.300, Abduction—By Parent Within the Commonwealth; for the latter see Instruction No. 4.400, Abduction—By Parent Outside the Commonwealth.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Abduction"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 7.1, 7.3[5]

MICHIE'S JURISPRUDENCE, Abduction and Kidnapping §§ 1

Instruction No. 4.400

Abduction—By Parent Outside the Commonwealth

The defendant is charged with the crime of abduction. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant is the parent of** (name of child)**; and**

(2) **That the defendant by** [force; intimidation; deception] **did** [seize; take; transport; detain; hide] (name of child)**; and**

(3) **That the defendant did so with the intent** [to deprive (name of child) of his personal liberty; to withhold or conceal (name of child) from (name of person, authority, or institution legally entitled to his charge)]**; and**

(4) **That the defendant acted without legal justification or excuse and in violation of a court order issued in a then pending proceeding; and**

(5) **That** (name of child) **was removed from the Commonwealth by the defendant.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.400

Abduction—By Parent Outside the Commonwealth

You have found the defendant guilty of the crime of abduction.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

See Sources and Authority Instruction Nos. 4.300 and P4.300, Abduction—By Parent Within the Commonwealth.

Instruction No. 4.500

Violation of Custody/Visitation Order Within the Commonwealth

The defendant is charged with the crime of withholding a child from the child's parent or legal guardian in violation of a court order. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant withheld (name of child) **from** (name of parent or legal guardian)**; and**

(2) That the defendant did so knowingly, wrongfully and intentionally; and

(3) That the defendant did so in a clear and significant violation of a court order respecting the custody or visitation of such child.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.500

Violation of Custody/Visitation Order Within the Commonwealth

You have found the defendant guilty of the crime of withholding a child from the child's parent or other legal guardian in violation of a court order.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A fine of a specific amount, but not more than $500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-49.1(B).

CASE AUTHORITY:

Boyd v. Commonwealth, 72 Va. App. 274, 280, 844 S.E.2d 425, 428 (2020); *Foster-Zahid v. Commonwealth, 23 Va. App. 430, 436–38, 477 S.E.2d 759, 762–64 (1996), aff'd per curiam, 254 Va. 168, 489 S.E.2d 687 (1997).*

PRACTICE COMMENTARY: See Instruction No. 4.300, Abduction—By Parent Within the Commonwealth and Instruction No. 4.400, Abduction—By Parent Outside the Commonwealth, for abduction of a child by a parent where the defendant acted without legal justification or excuse and in violation of a court order in a pending case. Va. Code Ann. § 18.2-47(D). See Instruction No. 4.100 for abduction by a parent or any other person when there is no court proceeding or court order. Va. Code Ann. § 18.2-47(A); *Diehl v. Commonwealth, 9 Va. App. 191, 194, 385 S.E.2d 228, 230 (1989).*

The term "wrongful" as used in element (2) of the offense means "unlawful or contrary to the law." *Boyd, 72 Va. App. at 280, 844 S.E.2d at 428.*

ALERTS:

• This crime is a Class 6 felony if the child is withheld outside of the Commonwealth. Va. Code Ann. § 18.2-49.1(A); Instruction No. 4.600, Violation of Custody/Visitation Order Outside the Commonwealth. If the child is withheld within the Commonwealth, the crime is a misdemeanor. The grade of the misdemeanor is determined by the number of violations. Va. Code Ann. § 18.2-49.1(B). This Instruction addresses only a first violation of Va. Code Ann. § 18.2-49.1(B). The Instruction may need to be altered if the defendant is charged with a subsequent violation of Va. Code Ann. § 18.2-49.1(B).

• The phrase "clear and significant violation of a court order" is not defined in the statute.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Abduction"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 7.1, 7.3[5]

MICHIE'S JURISPRUDENCE, Abduction and Kidnapping §§ 1–3

Instruction No. 4.600

Violation of Custody/Visitation Order Outside the Commonwealth

The defendant is charged with the crime of withholding a child from the child's parent or legal guardian in violation of a court order. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant withheld** (name of child) **from** (name of parent or legal guardian)**; and**

(2) **That the defendant did so knowingly, wrongfully and intentionally; and**

(3) **That the defendant did so in a clear and significant violation of a court order respecting the custody or visitation of such child; and**

(4) **That** (name of child) **was withheld outside of the Commonwealth by the defendant.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P4.600

Violation of Custody/Visitation Order Outside the Commonwealth

You have found the defendant guilty of the crime of withholding a child from the child's parent or other legal guardian in violation of a court order.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-49.1(A).

CASE AUTHORITY:

Boyd v. Commonwealth, 72 Va. App. 274, 280, 844 S.E.2d 425, 428 (2020; Foster-Zahid v. Commonwealth, 23 Va. App. 430, 436–38, 477 S.E.2d 759, 762–64 (1996), aff'd per curiam, 254 Va. 168, 489 S.E.2d 687 (1997).

PRACTICE COMMENTARY: See Instruction No. 4.300, Abduction—By Parent Within the Commonwealth and Instruction No. 4.400, Abduction—By Parent Outside the Commonwealth, for abduction of a child by a parent where the defendant acted without legal justification or excuse and in violation of a court order in a pending case. Va. Code Ann. § 18.2-47(D). See Instruction No. 4.100 for abduction by a parent or any other person when there is no court proceeding or court order. Va. Code Ann. § 18.2-47(A); *Diehl v. Commonwealth, 9 Va. App. 191, 194, 385 S.E.2d 228, 230 (1989).*

The term "wrongful" as used in element (2) of the offense means "unlawful or contrary to the law." *Boyd, 72 Va. App. at 280, 844 S.E.2d at 428.*

ALERTS:

• This crime is a Class 6 felony if the child is withheld outside of the Commonwealth. Va. Code Ann. § 18.2-49.1(A). If the child is withheld within the Commonwealth, the crime is a misdemeanor. The grade of the misdemeanor is determined by the number of violations. Va. Code Ann. § 18.2-49.1(B). This instruction addresses only violations of Va. Code Ann. § 18.2-49.1(A), where the child is removed from the Commonwealth. For violations of Va. Code Ann. § 18.2-49.1(B), where the child is not removed from the Commonwealth, see Instruction No. 4.500, Violation of Custody/Visitation Order Within the Commonwealth.

• The phrase "clear and significant violation of a court order" is not defined in the statute.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Abduction"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 7.1, 7.3[5].

MICHIE'S JURISPRUDENCE, Abduction and Kidnapping §§ 1–3

CHAPTER 5

[RESERVED]

CHAPTER 6

ALCOHOLIC BEVERAGES

Scope Note

Instruction No. 6.100 Manufacturing or Bottling Without License

Instruction No. P6.100 Manufacturing or Bottling Without License

Instruction No. 6.150 Manufacturing While Armed

Instruction No. P6.150 Manufacturing While Armed

Instruction No. 6.200 Illegal Sale—General

Instruction No. P6.200 Illegal Sale—General

Instruction No. 6.250 Illegal Sale—To Persons Not Permitted to Buy

Instruction No. P6.250 Illegal Sale—To Persons Not Permitted to Buy

Instruction No. 6.300 Illegal Purchase—General

Instruction No. P6.300 Illegal Purchase—General

Instruction No. 6.350 Illegal Purchase or Possession—By Persons Not Permitted to Purchase or Possess

Instruction No. P6.350 Illegal Purchase or Possession—By Persons Not Permitted to Purchase or Possess

Instruction No. 6.400 Maintaining Common Nuisance—Manufacture, Storage, Sale, Dispensing, Giving Away, or Use of Alcoholic Beverages

Instruction No. P6.400 Maintaining Common Nuisance—Manufacture, Storage, Sale, Dispensing, Giving Away, or Use of Alcoholic Beverages

SCOPE NOTE

These instructions cover some of the principal offenses regarding alcoholic beverages set forth in the Alcoholic Beverage Control Act.

Va. Code Ann. § 4.1-100 defines many of the terms used in the Act (e.g., "alcohol," "alcoholic beverage," "bottle," "intoxicated," "licensed," "sale"). The Model Jury Instruction Committee has not drafted instructions defining those terms based upon the belief that the statutory definition of those terms rarely is in dispute. When those statutory definitions are important to the resolution of an issue, however, preparation of an instruction based upon the statutory definition should be straightforward.

Instruction No. 6.100, based on Va. Code Ann. § 4.1-300, pertains to the illegal manufacturing of alcoholic beverages and the illegal bottling of beer for sale. Instruction No. 6.150, based on Va. Code Ann. § 4.1-318, pertains to the illegal manufacture of alcoholic beverages while armed.

Instruction No. 6.200, based on Va. Code Ann. § 4.1-302, is the general instruction for the illegal selling of alcoholic beverages, while Instruction No. 6.300, based on Va. Code Ann. § 4.1-303, is the general instruction for illegal purchasing. Instruction No. 6.250, based on Va. Code Ann. § 4.1-304, is the more specific instruction regarding the sale of alcoholic beverages, and it covers defendants who sell to minors and other persons prohibited by law from buying alcoholic beverages. Similarly, Instruction No. 6.350, based on Va. Code Ann. § 4.1-305, covers the case where the defendant is a purchaser or possessor who is prohibited by law from buying or possessing alcoholic beverages. Instruction No. 6.400, based on Va. Code Ann. § 4.1-317, concerns the maintenance of a common nuisance related to the manufacture, storage, sale, dispensing, giving away, or use of alcoholic beverages.

Va. Code Ann. § 4.1-351 allows for introduction of evidence of a prior conviction for violation of the alcoholic beverage control law. A prior conviction can only be used in determining punishment; it cannot be considered as tending to prove that the defendant is guilty of the particular crime for which he is currently being tried. *Simpson v. Commonwealth, 199 Va. 549, 554–55, 100 S.E.2d 701, 705 (1957)*; *Campbell v. Commonwealth, 176 Va. 564, 567–69, 11 S.E.2d 577, 577–78 (1940).*

Instruction No. 6.100

Manufacturing or Bottling Without License

The defendant is charged with the crime of [manufacturing alcoholic beverages; bottling beer for sale] **without being licensed to do so. The Commonwealth must prove beyond a reasonable doubt that:**

(1) the defendant [manufactured alcoholic beverages; bottled beer for sale]**; and**

(2) that he did so without a license.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of those elements, then you shall find the defendant not guilty.

Instruction No. P6.100

Manufacturing or Bottling Without License

You have found the defendant guilty of the crime of [manufacturing alcoholic beverages; bottling beer for sale] **without being licensed to do so.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-300(A).

CASE AUTHORITY:

Baughan v. Commonwealth, 206 Va. 28, 33–34, 141 S.E.2d 750, 754–55 (1965); Anderson v. Commonwealth, 195 Va. 258, 264, 77 S.E.2d 846, 849 (1953); Strange v. Commonwealth, 182 Va. 742, 744, 30 S.E.2d 552, 553 (1944); Duty v. Commonwealth, 137 Va. 759, 762–64, 119 S.E. 62, 64 (1923).

PRACTICE COMMENTARY:

Statutory Provisions. The provisions of Va. Code Ann. § 4.1-300(A) are applicable except "as otherwise provided in §§ 4.1-200 and 4.1-201 . . . ." Va. Code Ann. § 4.1-200 establishes exemptions from licensure for various manufacturing activities such as those that relate to medicine; certain types of medicinal, toilet and antiseptic preparations and solutions not intended for internal human use or to be sold as beverages; flavoring extracts used for cooking and culinary purposes; home brewing; and cider or wine sold to licensees. Va. Code Ann. § 4.1-201 sets forth several exceptions that cover other areas.

Manufacturing. The manufacture of alcoholic beverages "includes active efforts and means employed in producing or creating the beverages." *Strange, 182 Va. at 744, 30 S.E.2d at 553*. Moreover, manufacturing is a continuous process. *Id.*

Absence of a Still. The absence of a part of the still does not, of itself, preclude a conviction for attempted manufacturing. *Anderson, 195 Va. at 264, 77 S.E.2d at 849*. Furthermore, even if the defendant is not seen actively participating in the manufacturing process, this lack of evidence can be overcome by other circumstantial evidence linking him to the still. *Duty, 137 Va. at 762–63, 119 S.E. at 64*. However, testimony that establishes a defendant's presence at a still site is not dispositive as to whether that defendant engaged in manufacturing. *Lyons v. Commonwealth, 204 Va. 375, 378–79, 131 S.E.2d 407, 409 (1963).*

Presence of Mash. Va. Code Ann. § 4.1-300(B) provides that the presence of mash at an unlicensed distillery is deemed to constitute manufacturing within the meaning of the statute.

ALERTS:

• In *Baughan*, the Court held: "that there was no burden upon the Commonwealth to show that the defendant did not have a license." *206 Va. at 34, 141 S.E.2d at 755*. Where possession of a valid license or permit would be a defense to prosecution, the burden of producing evidence of a valid license rests upon the defendant since an accused can easily show a valid license if he has one. *Id. at 33–34, 141 S.E.2d at 755.*

Additionally, each license granted by the Alcohol Beverage Control Board must be posted in a location conspicuous to the public at the place the licensee carries on the business for which the license is granted. Va. Code Ann. § 4.1-203(C).

• *Baughan* involved the illegal sale of alcoholic beverages. In part, the Court's holding rested upon judicial notice of other statutory provisions that, in the Court's opinion, made it factually impossible for Baughan to have a license to sell whiskey. *Baughan, 206 Va. at 34, 141 S.E.2d at 755*. Whether or not a charge of unlicensed manufacturing of alcoholic beverages or bottling of beer for sale can be distinguished on that basis is unknown.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 33, 34

Instruction No. 6.150

Manufacturing While Armed

The defendant is charged with the crime of unlawfully manufacturing [transporting; selling] **alcoholic beverages while in possession of a** (specify dangerous weapon described in Va. Code Ann. § 18.2-308). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant engaged in the unlawful [manufacture; transport; sale of alcoholic beverages]**; and**

(2) That, while doing so, the defendant [carried on or about his person; had in his possession, actual or constructive, within 100 yards of any place where the alcoholic beverages were being manufactured; have on or in any vehicle which he may be using to aid him in such purchase] **a** (specify dangerous weapon described in Va. Code Ann. § 18.2-308).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P6.150

Manufacturing While Armed

You have found the defendant guilty of the crime of unlawfully manufacturing [transporting; selling] **alcoholic beverages while in possession of a** (specify dangerous weapon described in Va. Code Ann. § 18.2-308).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-318.

CASE AUTHORITY:

Ruff v. Gathright, 373 F. Supp. 232, 234 (W.D. Va. 1974).

PRACTICE COMMENTARY:

Actual or Constructive Possession of Weapon. The possession of a firearm can be either actual or constructive. Va. Code Ann. § 4.1-318. In *Ruff*, the court ruled that "if the weapon is in the immediate area and subject to dominion and control there is constructive possession." *Ruff, 373 F. Supp. at 234.* For a general discussion of the principles governing constructive possession, *see Smallwood v. Commonwealth, 278 Va. 625, 688 S.E.2d 154 (2009)* (constructive possession of a firearm under Va. Code Ann. § 18.2-308.2).

Burden of Proof. See *Alerts* to Instruction No. 6.100 for a discussion concerning the burden of proof regarding a valid license if that would be a defense under the circumstances of a particular case.

☞ *PRACTICE POINTER:*

Va. Code Ann. § 4.1-318 prohibits "any dangerous weapon as described in § 18.2-308". See Practice Commentary to Instruction No. 18.600, Carrying Concealed Weapons, for details regarding what constitutes a "dangerous weapon" under Va. Code Ann. § 18.2-308.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 33, 34

Instruction No. 6.200

Illegal Sale—General

The defendant is charged with the crime of illegally selling an alcoholic beverage without being licensed to do so. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) that the defendant sold an alcoholic beverage; and

(2) that he did so without a license.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime as charged, then you shall find the defendant not guilty.

Instruction No. P6.200

Illegal Sale—General

You have found the defendant guilty of the crime of illegally selling an alcoholic beverage without being licensed to do so. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-302.

CASE AUTHORITY:

Baughan v. Commonwealth, 206 Va. 28, 33–34, 141 S.E.2d 750, 754–55 (1965), Swift v. Commonwealth, 199 Va. 420, 424, 100 S.E.2d 9, 11–12 (1957); Harris v. Commonwealth, 174 Va. 486, 490–92, 6 S.E.2d 678, 679–80 (1940).

PRACTICE COMMENTARY:

Definition of Purchase and Sale. Va. Code Ann. § 4.1-100 defines the terms "sale" and "sell" for purposes of this crime.

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 4.1-302 requires a mandatory minimum jail sentence of 30 days for a second or subsequent conviction.

☞ ***PRACTICE POINTER:***

If the evidence raises the issue of entrapment by a law enforcement officer, Instruction No. 52.400 (Entrapment) should be considered. See *Harris, 174 Va. at 490–92, 6 S.E.2d at 679–80*, discussing *Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938)*; see also *Swift, 199 Va. at 424, 100 S.E.2d at 11–12*.

ALERTS:

• In *Baughan*, the Court held: "that there was no burden upon the Commonwealth to show that the defendant did not have a license." *206 Va. at 34, 141 S.E.2d at 755*. Where possession of a valid license or permit would be a defense to prosecution, the burden of producing evidence of a valid license rests upon the defendant since an accused can easily show a valid license if he has one. *Id. at 33–34, 141 S.E.2d at 755*.

Additionally, each license granted by the Alcohol Beverage Control Board must be posted in a location conspicuous to the public at the place the licensee carries on the business for which the license is granted. Va. Code Ann. § 4.1-203(C).

• *Baughan* involved the illegal sale of alcoholic beverages. In part, the Court's holding rested upon judicial notice of other statutory provisions that, in the Court's opinion, made it factually impossible for Baughan to have a license to sell whiskey. *Baughan, 206 Va. at 34, 141 S.E.2d at 755*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 35

Instruction No. 6.250

Illegal Sale—To Persons Not Permitted to Buy

The defendant is charged with the crime of illegally selling an alcoholic beverage. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sold an alcoholic beverage; and

(2) That at the time of such sale, the defendant knew or had reason to believe that the individual to whom the sale was made was [less than twenty-one (21) years old; a person to whom the sale of alcoholic beverages is prohibited by court order; an intoxicated person].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P6.250

Illegal Sale—To Persons Not Permitted to Buy

You have found the defendant guilty of the crime of illegally selling an alcoholic beverage. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-304.

CASE AUTHORITY:

Gardner v. Commonwealth, 195 Va. 945, 954, 81 S.E.2d 614, 619 (1954); *Calamos v. Commonwealth, 184 Va. 397, 404–07, 35 S.E.2d 397, 399–401 (1945).*

PRACTICE COMMENTARY:

Multiple Offenses. The governing statute Va. Code Ann. § 4.1-304 creates two similar but separate offenses, described in subsections (A) and (B). This instruction relates only to the Class 1 misdemeanor under subsection (A). Va. Code Ann. § 4.1-304(B) provides that a person who sells an alcoholic beverage to an individual who was less than 21 years of age, and at the time of the sale did not require bona fide evidence that the individual was 21 years of age or older is guilty of a Class 3 misdemeanor. The subsection also specifies the types of bona fide evidence of legal age which satisfy its requirements.

Va. Code Ann. § 4.1-304(C) provides that "[n]o person shall be convicted of both subsections A and B for the same sale."

Definition of "Intoxicated". Va. Code Ann. § 4.1-100 defines "intoxicated" for purposes of this crime. This specific definition was approved for use in a jury instruction in *Gardner, 195 Va. at 954, 81 S.E.2d at 619.*

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 4.1-100 also defines "interdicted person" and "alcoholic beverages."

Va. Code Ann. § 4.1-306 prohibits a person from purchasing alcohol for a person who is either interdicted or intoxicated, and it also prohibits the purchasing, giving, providing or assisting in the provision of alcohol to a person under 21 years of age. The instruction should be adapted accordingly if the charge is under that statute.

ALERTS:

• When the defendant sells an alcoholic beverage to a person who is prohibited from buying because of a specific court order, the defendant must have actual notice of the order before he can be convicted. In *Calamos,* the court refused to infer constructive notice and reversed the defendant's conviction, even though the order prohibiting the sale was published in the local newspaper in accord with the statute and the defendant had been warned to check the papers for the list of interdicted persons. *184 Va. at 406, 35 S.E.2d at 400.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 35

Instruction No. 6.300

Illegal Purchase—General

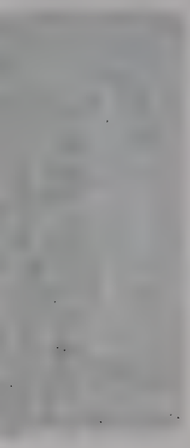
The defendant is charged with the crime of purchasing an alcoholic beverage from a person not authorized to sell. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant purchased an alcoholic beverage; and

(2) That the purchase was made from a person not authorized by law to make such sale.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.



Instruction No. P6.300

Illegal Purchase—General

You have found the defendant guilty of the crime of illegally purchasing an alcoholic beverage from a person not authorized to sell. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-303.

CASE AUTHORITY:

Guthrie v. Commonwealth, 171 Va. 461, 464–70, 198 S.E. 481, 482–85 (1938).

PRACTICE COMMENTARY: Va. Code Ann. § 4.1-303 specifically prohibits the purchase of alcoholic beverages from anyone other than "the Board, a government store or a person authorized under this title to sell alcoholic beverages . . . ." If necessary, a separate instruction defining who is authorized to sell alcoholic beverages should be prepared and used with this instruction.

An ABC officer who, in the course of his employment, purchased an alcoholic beverage from one whom the officer knew was selling illegally is only a "feigned accomplice," thus, his uncorroborated testimony was sufficient to support a verdict and the defendant was not entitled to have the jury instructed that such testimony should be reviewed with caution. *Guthrie, 171 Va. at 470, 198 S.E. at 485.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 35

Instruction No. 6.350

Illegal Purchase or Possession—By Persons Not Permitted to Purchase or Possess

The defendant is charged with the crime of illegally [purchasing; consuming; possessing; attempting to purchase; attempting to consume; attempting to possess] **an alcoholic beverage. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [purchased; consumed; possessed; attempted to purchase; attempted to consume; attempted to possess] **an alcoholic beverage; and**

(2) **That at the time of such** [purchase; consumption; possession; attempt to purchase; attempt to consume; attempt to possess], **the defendant was** [less than twenty-one years old; a person to whom the sale of alcoholic beverages is prohibited by court order; an intoxicated person].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt each of the above elements of the crime as charged, then you must find the defendant not guilty. But if you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you must find the defendant guilty.

Instruction No. P6.350

Illegal Purchase or Possession—By Persons Not Permitted to Purchase or Possess

You have found the defendant guilty of the crime of illegally [purchasing; consuming; possessing; attempting to purchase; attempting to consume; attempting to possess] **an alcoholic beverage. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:**

(1) A fine of a specific amount, but not less than $500 nor more than $2,500; or,

(2) A fine of a specific amount, but not less than $500 nor more than $2,500, and confinement in jail for a specific time, but not more than twelve (12) months.

Sources & Authority

Governing Statute:

Va. Code Ann. §§ 4.1-305, 4.1-322, 4.1-333, 19.2-295, 19.2-303.

Case Authority:

Hale v. Commonwealth, 23 Va. App. 587, 591–92, 478 S.E.2d 710, 712 (1996); Wheeler v. Commonwealth, 192 Va. 665, 668–69, 66 S.E.2d 605, 606–07 (1951), overruled on other grounds by Watkins v. Commonwealth, 238 Va. 341, 350–51, 385 S.E.2d 50, 55–56 (1989).

Practice Commentary:

Court Ordered Prohibition. It should be noted that the language in the instruction that says, "[A] person to whom the sale of alcoholic beverages is prohibited by court order" refers specifically to a person who is interdicted. Va. Code Ann. §§ 4.1-304 and 305. Alternatively, persons who have been interdicted may be prosecuted under Va. Code Ann. § 4.1-322.

However, civil interdiction orders based on a court determination that the person is an "habitual drunkard" are void as unconstitutionally vague. *Manning v. Caldwell, 930 F.3d 264 (4th Cir. 2019).* In 2020, the General Assembly amended Va. Code Ann. § 4.1-333 by striking the "habitual drunkard" language as a basis for interdicting an individual.

Affirmative Defense—Guest Under 21. Va. Code Ann. § 4.1-305 also specifies that, "it shall be an affirmative defense to a charge of a violation of this subsection if defendant shows that such consumption or possession was pursuant to subdivision 7 of § 4.1-200." Va. Code Ann. § 4.1-200(7) provides that a person who lawfully acquired alcoholic beverages in his residence for personal or family use may serve such beverage to a guest under 21 years of age when: (1) such a guest is accompanied by a parent, guardian, or spouse who is 21 years or older; (2) the consumption or possession of such alcoholic beverages by such guests only occurs in the residence; and (3) such service is in no way a shift or device to evade the provisions of the title.

Exemptions. Va. Code Ann. § 4.1-305 provides that the provisions of the section pertaining to possession shall not apply to the possession of alcoholic beverages by a person less than 21 years of age making a delivery of the alcoholic beverages in pursuance of his employment or an order of a parent, or to any state, federal or local law enforcement officer when possession of an alcoholic beverage is necessary in the performance of his duties.

Indicia of Possession. Evidence of prior consumption of an alcoholic beverage, bloodshot eyes, odor of alcohol and an alcosenser test can support a conviction of underage possession of an alcoholic beverage. *Hale, 23 Va. App. at 592, 478 S.E.2d at 712.*

Punishment. Violation of Va. Code Ann. § 4.1-322 is a Class 1 misdemeanor. Instruction No. P6.350 should be modified accordingly.

Violation of Va. Code Ann. § 4.1-305 is a Class 1 misdemeanor, but the statute mandates a minimum fine of $500 or, in the alternative, performance of no less than 50 hours of community service as a condition of probation supervision, and also provides that the operator's license of a defendant who is 18 years of age or older shall be suspended not less than 6 months and not more than 1 year. Instruction P6.350 provides for the minimum, mandatory fine and for the potential jail sentence. The instruction does not, however, provide for the community service alternative nor the mandatory license suspension, since the jury's ascertainment of punishment under the Virginia statutory sentencing provisions is limited to establishing the term of confinement in a state correctional facility or in jail and the amount of fine, if any, within the limits prescribed by law. Thereafter, the trial court may suspend some or all of the jury's recommended sentence, within any limits prescribed by law, and may place the defendant on probation supervision and order, among other things, community service. Va. Code Ann. §§ 19.2-295, 19.2-303; *Boyd v. Commonwealth, 28 Va. App. 537, 540-41, 507 S.E.2d 107, 109 (1998).*

As a consequence of the statutory delineation of sentencing functions and authority, Instruction No. P6.350 therefore sets forth the sole affirmative punishments a jury would be permitted to ascertain pursuant to the provisions of Va. Code Ann. § 4.1-305, consistent with the limits imposed by Va. Code Ann. § 19.2-295. The first alternative is comprised of a single component, which is a fine only, but of at least the mandatory minimum amount of $500. The second alternative is comprised of dual components. They are the same fine requirement as before, coupled with the imposition of a jail sentence of up to 12 months. The jury must choose either the single component first alternative or the dual component second alternative, since they are mutually exclusive based upon the mandatory aspect of the minimum fine and the discretionary aspect of the jail sentence for a Class 1 misdemeanor.

Restricted License—Deferred Disposition. In addition to the foregoing, Va. Code Ann. § 4.1-305 expressly grants the court discretion to issue a restricted operator's license under certain terms and conditions and to defer a finding of guilt for a defendant not previously convicted of underage possession of alcohol.

ALERTS:

• When the defendant has already been convicted for illegally selling liquor, the prosecution cannot try the defendant for possession of the same liquor. *Wheeler, 192 Va. at 669, 66 S.E.2d at 607.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors §§ 27–30, 35–40

Instruction No. 6.400

Maintaining Common Nuisance—Manufacture, Storage, Sale, Dispensing, Giving Away, or Use of Alcoholic Beverages

The defendant is charged with the crime of [maintaining; aiding; abetting; knowingly associating with others in maintaining] **a common nuisance. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That alcoholic beverages were frequently** [manufactured; stored; sold; dispensed; given away; used] [at a house; boathouse; building; club or fraternity or lodge room; boat; car; other place] **in a manner contrary to law; and**

(2) **That the defendant** [maintained; aided; abetted; knowingly associated with others in maintaining] **such** [place].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P6.400

Maintaining Common Nuisance—Manufacture, Storage, Sale, Dispensing, Giving Away, or Use of Alcoholic Beverages

You have found the defendant guilty of the crime of [maintaining, keeping, or operating; aiding; abetting; knowingly associating with others in maintaining, keeping, or operating] **a common nuisance. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:**

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-317.

CASE AUTHORITY:

Luttrell v. Commonwealth, 208 Va. 774, 776–77, 160 S.E.2d 757, 759 (1968); Crowe v. Commonwealth, 193 Va. 752, 755, 71 S.E.2d 77, 79 (1952); McCullough v. Commonwealth, 182 Va. 26, 27–29, 27 S.E.2d 904, 905 (1943); St. Clair v. Commonwealth, 174 Va. 480, 482, 5 S.E.2d 512, 513 (1939); Dudley v. Commonwealth, 174 Va. 466, 469–70, 5 S.E.2d 473, 474–75 (1939); Smith v. Commonwealth, 171 Va. 480, 482–84, 198 S.E. 432, 433 (1938); Woods v. Commonwealth, 171 Va. 543, 545–46, 199 S.E. 465, 465–66 (1938); Campbell v. Commonwealth, 167 Va. 448, 449–50, 187 S.E. 502, 502–03 (1936).

PRACTICE COMMENTARY: The language of Instruction 6.400 is based on the holdings in *St. Clair, 174 Va. at 482, 5 S.E.2d at 513*, and *Luttrell, 208 Va. at 776–77, 160 S.E.2d at 759*.

Scope of Statute. Va. Code Ann. § 4.1-317 is broad and includes many different types of acts regarding the use of alcoholic beverages at various specified places, as well as "places of every description," "contrary to law." This instruction is therefore drafted to track the statutory terms and phrases. In particular, the phrase "contrary to law," which encompasses the entire body of law related to this subject, has not been reduced to a more precise definition in this instruction. If there is an issue in a particular case as to whether or not the acts alleged were "contrary to law," separate instructions setting forth the law or laws at issue should be crafted.

Elements. Two distinct and crucial facts must be established before the Commonwealth can sustain a conviction under this statute. First, alcoholic beverages must be habitually sold, stored, manufactured, dispensed, given away, or used on the premises in a manner contrary to law. Second, the defendant must maintain, aid, abet, or knowingly associate with another person in such unlawful activities. *St. Clair, 174 Va. at 482, 5 S.E.2d at 513*.

☞ ***PRACTICE POINTER:***

Circumstantial evidence, when considered as a whole, is sufficient to convict the defendant. See *Woods, 171 Va. at 545–46, 199 S.E. at 465–66*.

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 4.1-317(B) also provides for proceedings to shut down premises found to be a common nuisance.

ALERTS:

• ***Precision in Terminology.*** The terms "premises" and "place" have been used interchangeably in the cited cases to describe the location of the common nuisance. When possible, however, a more specific term as set forth in the statute, such as "house" or "car," describing the location of the nuisance in question should be used.

• ***Additional Elements.*** Va. Code Ann. § 4.1-317(C) is limited to situations where an owner, lessor, or lienholder is charged with maintaining a nuisance because of violations by his invitee, lessee, or the like. In such cases, the Commonwealth must prove two additional elements: that the defendant knew of the unlawful activities at issue; and that he had the right to enter and repossess the property because of those unlawful activities. These elements can be added to the instruction, depending on the facts of the case.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alcohol Offenses"

MICHIE'S JURISPRUDENCE, Intoxicating Liquors § 44

CHAPTER 7

ARSON

Scope Note

Instruction No. 7.050 Fire Presumed Accidental

Instruction No. 7.100 Burning Dwelling

Instruction No. P7.100(a) Burning Dwelling—Occupied

Instruction No. P7.100(b) Burning Dwelling—Unoccupied

Instruction No. 7.150 Dwelling House—Definition

Instruction No. 7.200 Burning Structure or Building Other Than Dwelling—Occupied

Instruction No. P7.200(a) Burning Structure or Building Other Than Dwelling—Occupied

Instruction No. P7.200(b) Burning Structure or Building Other Than Dwelling—Unoccupied

Instruction No. 7.250 Burning Structure or Building Other Than Dwelling—Unoccupied

Instruction No. P7.250 Burning Structure or Building Other Than Dwelling—Unoccupied

Instruction No. 7.300 Burning Realty With Malice or Intent to Defraud—Person Therein

Instruction No. P7.300(a) Burning Realty With Malice or Intent to Defraud—Person Therein

Instruction No. P7.300(b) Burning Realty With Malice or Intent to Defraud—No Person Therein

Instruction No. P7.300(c) Burning Realty With Malice or Intent to Defraud (Misdemeanor)

Instruction No. 7.350 Burning Realty With Malice or Intent to Defraud—No Person Therein

Instruction No. P7.350(a) Burning Realty With Malice or Intent to Defraud—No Person Therein—Felony

Instruction No. P7.350(b) Burning Realty With Malice or Intent to Defraud—No Person Therein—Misdemeanor

Instruction No. 7.400 Burning Personal Property

Instruction No. P7.400(a) Burning Personal Property—Felony

Instruction No. P7.400(b) Burning Personal Property—Misdemeanor

Instruction No. 7.500 Burning Building or Structure While Unlawfully Therein With Intent to Commit Felony

Instruction No. P7.500 Burning Building or Structure While Unlawfully Therein With Intent to Commit Felony

Instruction No. 7.600 Threatening to Bomb or Damage Buildings, etc.

Instruction No. P7.600 Threatening to Bomb or Damage Buildings, etc.

Instruction No. 7.650 Communicating False Information

Instruction No. P7.650 Communicating False Information

Instruction No. 7.700 Possession of Fire Bomb Material

Instruction No. P7.700 Possession of Fire Bomb Material

Instruction No. 7.750 Manufacturing, Transporting, Distributing, Possessing, or Using Fire Bomb or Explosive Material or Device

Instruction No. P7.750 Manufacturing, Transporting, Distributing, Possessing, or Using Fire Bomb or Explosive Material or Device

SCOPE NOTE

The following instructions cover the principal crimes relating to arson and the destruction of or threat to destroy property. Instruction No. 7.050 contains the presumption that fires are caused by accident rather than from the deliberate act of anyone.

Instruction No. 7.100, based on Va. Code Ann. § 18.2-77, defines the elements of and penalty for arson of a dwelling house or place where people usually dwell or lodge. Instruction No. 7.150 defines "dwelling house." Va. Code Ann. § 18.2-78 describes certain structures that are not considered "dwelling houses."

Instruction No. 7.200 deals with the burning or destruction of occupied structures or buildings erected for public use while Instruction No. 7.250 covers the same crime against unoccupied structures or buildings.

Va. Code Ann. § 18.2-80 makes it a crime to burn or destroy a building or other structure, the burning of which is not prohibited under any other section, with either malicious intent or intent to defraud. This offense is covered by Instruction No. 7.300. Destruction of such a building or structure while unoccupied is covered by Instruction No. 7.350, which prescribes increased penalties in the event that the property destroyed was worth $500 or more. Instruction No. 7.400, based on Va. Code Ann. § 18.2-81, deals with the burning or destroying of personal property.

Instruction No. 7.500 concerns the crime of burning a building or structure by one who is inside such building or structure unlawfully with intent to commit a felony therein. Va. Code Ann. § 18.2-82.

Threatening to bomb, burn or destroy a building, structure or means of transportation, proscribed by Va. Code Ann. § 18.2-83, is the subject of Instruction No. 7.600, while Instruction No. 7.650 covers the crime of communicating false information about the existence of any peril of bombing or destruction.

Possession of materials for manufacturing fire bombs or explosive materials or devices and the manufacture, transportation, possession, distribution and use of fire bombs and other explosive materials and devices, outlawed by Va. Code Ann. § 18.2-85, is covered by Instruction Nos. 7.700 and 7.750.

Instruction No. 7.050

Fire Presumed Accidental

When a building or structure burns, the fire is presumed to have been caused by accident rather than from the deliberate act of anyone. The defendant is entitled to this presumption unless the Commonwealth proves beyond a reasonable doubt that he intentionally caused the fire.

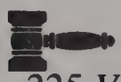
SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Riner v. Commonwealth, 268 Va. 296, 328, 601 S.E.2d 555, 573 (2004); Cook v. Commonwealth, 226 Va. 427, 431–32, 309 S.E.2d 325, 328 (1983); Augustine v. Commonwealth, 226 Va. 120, 123, 306 S.E.2d 886, 888 (1983); Knight v. Commonwealth, 225 Va. 85, 89, 300 S.E.2d 600, 601–02 (1983); Simmons v. Commonwealth, 208 Va. 778, 782, 160 S.E.2d 569, 572–73 (1968); Poulos v. Commonwealth, 174 Va. 495, 500, 6 S.E.2d 666, 668 (1940); Jones v. Commonwealth, 103 Va. 1012, 1021, 49 S.E. 663, 666 (1905).



PRACTICE COMMENTARY: The presumption is rebuttable. *E.g., Knight, 225 Va. at 89, 300 S.E.2d at 602.* Whether the fire is of accidental or incendiary origin is a question of fact. *Cook, 226 Va. at 432, 309 S.E.2d at 328.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.100

Burning Dwelling

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [burned; by use of an explosive device or substance destroyed in whole or in part; caused to be burned or destroyed; aided, counseled or procured the burning or destruction of; set fire to anything the burning of which caused the burning of; aided, counseled or procured the setting fire to anything the burning of which caused the burning of] **a** [dwelling house; manufactured home; hotel; hospital; mental health facility; house, railroad car, boat, vessel or river craft, in which persons usually dwell or lodge; jail; prison; or any occupied church or church building immediately adjacent thereto]; **and**

(2) That the defendant acted with malice; and

(3) That the [dwelling house; manufactured home; hotel; hospital; mental health facility; house, railroad car, boat, vessel or river craft, in which persons usually dwell or lodge; jail; prison; or any occupied church or church building immediately adjacent thereto] **was occupied.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of arson of an occupied structure.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the above crime, but you find that the [dwelling house; manufactured home; hotel; hospital; mental health facility; house, railroad car, boat, vessel or river craft, in which persons usually dwell or lodge; jail; prison; or any occupied church or church building immediately adjacent thereto] **was unoccupied at the time the crime was committed, then you shall find the defendant guilty of arson of an unoccupied building.**

If you find the defendant guilty, you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the first two elements of the above crime, then you shall find the defendant not guilty.

Instruction No. P7.100(a)

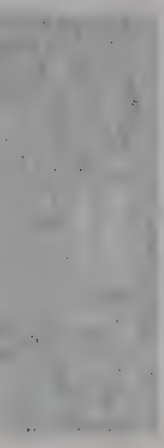
Burning Dwelling—Occupied

You have found the defendant guilty of the crime of arson of an occupied dwelling.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than five (5) years; or

(2) Imprisonment for life or for a specific term, but not less than five (5) years, and a fine of a specific amount, but not more than $100,000.



Instruction No. P7.100(b)

Burning Dwelling—Unoccupied

You have found the defendant guilty of the crime of arson of an unoccupied dwelling.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-77.

CASE AUTHORITY:

Schwartz v. Commonwealth, 267 Va. 751, 753–55, 594 S.E.2d 925, 926–27 (2004); Riner v. Commonwealth, 268 Va. 296, 328–30, 601 S.E.2d 555, 573–74 (2004); Alston v. Commonwealth, 32 Va. App. 661, 665–67, 529 S.E.2d 851, 853–54 (2000); Hickson v. Commonwealth, 258 Va. 383, 387–89, 520 S.E.2d 643, 645–46 (1999); Marable v. Commonwealth, 27 Va. App. 505, 510–13, 500 S.E.2d 233, 235–37 (1998); Cook v. Commonwealth, 226 Va. 427, 431–33, 309 S.E.2d 325, 328–29 (1983); Braxton v. Commonwealth, 209 Va. 750, 752–54, 167 S.E.2d 120, 122–23 (1969); Simmons v. Commonwealth, 208 Va. 778, 782–83, 160 S.E.2d 569, 572–73 (1968); La Prade v. Commonwealth, 191 Va. 410, 412–22, 61 S.E.2d 313, 313–18 (1950); Poulos v. Commonwealth, 174 Va. 495, 500, 6 S.E.2d 666, 668 (1940); Daniels v. Commonwealth, 172 Va. 583, 587–94, 1 S.E.2d 333, 335–38 (1939); Stine v. Commonwealth, 162 Va. 856, 860–69, 174 S.E. 758, 760–63 (1934); Jones v. Commonwealth, 103 Va. 1012, 1013–21, 49 S.E. 663, 663–66 (1905); Brown v. Commonwealth, 87 Va. 215, 217–21, 12 S.E. 472, 472–74 (1890).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-77 makes burning a listed structure a 5-years-to-life felony unless the structure is "unoccupied." In that event, the crime is a Class 4 felony.

Presumption. Where a building or structure is burned, the presumption is that the fire was caused by accident rather than by act of the accused accompanied by deliberate intent. *Cook, 226 Va. at 431–33, 309 S.E.2d at 328–29.* See Instruction No. 7.050 and related Case Authority.

Elements and Proof. To establish arson, the Commonwealth must prove that the fire was of incendiary origin and that the defendant was the guilty agent. *Hickson, 258 Va. at 387–89, 520 S.E.2d at 645–46*; *Cook, 226 Va. at 431–33, 309 S.E.2d at 328–29; Stine, 162 Va. at 860–69, 174 S.E. at 760–63.* Since arson is a crime of stealth, the proof is often circumstantial and will support conviction if it excludes every reasonable hypothesis of innocence. *Hickson, 258 Va. at 387–89, 520 S.E.2d at 645–46; Cook, 226 Va. at 431–33, 309 S.E.2d at 328–29.*

In *Schwartz, 267 Va. at 754, 594 S.E.2d at 927*, the Court held that "the term 'anything' in Va. Code Ann. § 18.2-77 refers to the accelerant used to start the fire of a dwelling, not the object of the fire." The Court also held that Va. Code Ann. § 18.2-81 should not be "construed as permitting a separate arson prosecution for every item destroyed in a home or a car, such as a shoe, a sock, a pillow, etc." *Id. at 754–55, 594 S.E.2d at 927.*

For a discussion of the elements of attempted arson, see *Davis v. Commonwealth, 65 Va. App. 485, 500–02, 778 S.E.2d 557, 565–66 (2015).*

Malice. In *Hamm v. Commonwealth, 16 Va. App. 150, 153–54, 428 S.E.2d 517, 520 (1993)*, interpreting § 18.2-81, the court stated:

Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will." *Bell v. Commonwealth, 11 Va. App. 530, 533, 399 S.E.2d 450, 452 (1991)* (quoting *Long v. Commonwealth, 8 Va. App. 194, 198, 379 S.E.2d 473, 475–76 (1989)).* Malice, therefore, in the case of arson, is not necessarily a feeling of ill will toward another person, but may be a purposeful intent to do a wrongful act. Consequently, malice may be inferred from the fact that a person intentionally burned insured property for the purpose of defrauding or injuring an insurance carrier . . . . The jury could infer malice from the proof that Hamm burned the Thomasons' automobile for the purpose of helping them collect on a fraudulent insurance claim.

"No Virginia case distinguishes the malice which is a necessary element of arson from the malice which has been required in other common law crimes." *Bell, 11 Va. App. at 532, 399 S.E.2d at 452* (interpreting Va. Code Ann. § 18.2-79). It is well-settled in Virginia that: "[m]alice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will. It may be directly evidenced by words, or inferred from acts and conduct which neces[s]arily result in injury. Its existence is a question of fact to be determined by [the trier of fact]." *Id. at 532–33, 399 S.E.2d at 452* ("[the defendant's] conduct in placing a foam rubber cushion in front of the door of [a] plywood structure, dousing it with gasoline, and striking a match to it showed enough ill will to support the trial judge's finding of malice").

Related Instructions. Instruction No. 7.150 defines "dwelling house."

☞ ***PRACTICE POINTER:***

Concerning the burning of jails during an escape, or an attempt to escape, see Va. Code Ann. § 18.2-480.

ALERTS:

• ***(1) Daytime and Nighttime.*** All cases cited above except *Marable, Hickson, Alston, Schwartz,* and *Riner* were decided under prior law, which distinguished between offenses committed in daytime and nighttime.

• ***(2) Definition of Occupied or Unoccupied.*** The Committee does not attempt to define "occupied" or "unoccupied." It is recommended that care and caution be used to tailor an appropriate definition to the peculiar facts of the case being tried. For a discussion of occupied and unoccupied in a burglary case, see *Johnson v. Commonwealth, 18 Va. App. 441, 444 S.E.2d 559 (1994).*

• ***(3) Incomplete or Unoccupied Buildings.*** Earlier versions of Va. Code Ann. § 18.2-77 were held not to cover an incomplete or unoccupied building intended as a dwelling house, *Daniels, 172 Va. at 587–88, 1 S.E.2d at 335–36*, or a house built for and used in the past as a dwelling but unoccupied for a period of months prior to the burning, see, e.g., *Hooker v. Commonwealth, 54 Va. (13 Gratt.) 763, 764–65 (1855).* If not covered by Va. Code Ann. § 18.2-77, these buildings would be within the ambit of Va. Code Ann. § 18.2-80. See Instruction Nos. 7.300 and 7.350.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.150

Dwelling House—Definition

A dwelling house is any structure in which one or more persons usually dwell or lodge.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-77, 18.2-78.

CASE AUTHORITY:

Davis v. Commonwealth, 16 Va. App. 6, 8, 427 S.E.2d 441, 442 (1993); *Daniels v. Commonwealth, 172 Va. 583, 588, 1 S.E.2d 333, 335–36 (1939); Hooker v. Commonwealth, 54 Va. (13 Gratt.) 763, 764–65 (1855).*

PRACTICE COMMENTARY: A building intended as a dwelling house but not occupied for many months is not a dwelling house within the meaning of Va. Code Ann. § 18.2-77. *Hooker, 54 Va. (13 Gratt.) at 764–65*. Nor is an incomplete and unoccupied building, though intended as a dwelling house, within the ambit of the statute. *Daniels, 172 Va. at 587–88, 1 S.E.2d at 335–36*. In addition, a dwelling is not "temporarily unoccupied" within the meaning of the statute if its inhabitants are temporarily absent with an intention to return. *Davis, 16 Va. App. at 8, 427 S.E.2d at 442*.

There may be circumstances where evidence does not permit a conclusion as a matter of law that the structure is or is not a dwelling house or house trailer. In such a case, a jury issue may be presented and this instruction should be used.

See also Practice Commentary to Instruction No. 7.100.

ALERTS:

• Although *Daniels* might be read to indicate that the common law definition of arson "covers outhouses and other structures appurtenant thereto and within curtilage," *172 Va. at 588, 1 S.E.2d at 335–36*, Va. Code Ann. § 18.2-78 excludes from the definition of dwelling house an "outhouse, not adjoining a dwelling house, nor under the same roof, . . . unless some person usually lodge therein at night."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.200

Burning Structure or Building Other Than Dwelling—Occupied

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [burned; by use of an explosive device or substance destroyed in whole or in part; caused to be burned or destroyed; aided, counseled or procured the burning or destruction of; set fire to anything the burning of which caused the burning of; caused to be set on fire anything, the burning of which caused the burning of; aided, counseled or procured the setting fire to anything the burning of which caused the burning of] **a** [(building or structure referred to in § 18.2-79)]; **and**

(2) **That the defendant acted with malice; and**

(3) **That at the time there was a person therein; and**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of arson of an occupied structure.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime but has not proved beyond a reasonable doubt that there was a person therein at the time the crime was committed, then you shall find the defendant guilty of arson of an unoccupied structure.

If you find the defendant guilty, you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the above crime, then you shall find the defendant not guilty.

Instruction No. P7.200(a)

Burning Structure or Building Other Than Dwelling—Occupied

You have found the defendant guilty of the crime of arson of an occupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P7.200(b)

Burning Structure or Building Other Than Dwelling—Unoccupied

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-79.

CASE AUTHORITY:

Wilson v. Commonwealth, 66 Va. App. 9, 14, 781 S.E.2d 754, 756 (2016); Hancock v. Commonwealth, 12 Va. App. 774, 778–79, 407 S.E.2d 301, 303–04 (1991); Bell v. Commonwealth, 11 Va. App. 530, 532–33, 399 S.E.2d 450, 452 (1991).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-79 relates to the burning or destruction of specified places as well as to any "other house, whether the property of [the accused] or of another person, not usually occupied by persons lodging therein at night." It prescribes enhanced penalties for the burning of a building at a time when a person is present therein.

Va. Code Ann. 18.2-79 uses the terms "warehouse" and "storehouse." As used in this statute, the term "warehouse" is "a specific type of storage structure used in a commercial setting to hold excess goods prior to retail sale at some other location." *Wilson, 66 Va. App. at 17, 781 S.E.2d at 758*. A "storehouse," by contrast, "is a general type of structure for storing goods for a number of purposes." *Id.* Therefore, a "storehouse" is "a class of storage structures that includes both retail stores and structures used for the storage of provisions and goods." *Id. at 17–18, 781 S.E.2d at 758* (a retail country store is a "storehouse" under Va. Code Ann. § 18.2-79 where trial court's finding that grain was stored there was supported by the evidence).

It is immaterial whether the destructive act proscribed by Va. Code Ann. § 18.2-79 occurred in the day or nighttime.

Malice. " 'Maliciously' is not specifically defined in Va. Code Ann. § 18.2-79," and "[n]o Virginia case distinguishes the malice which is a necessary element of arson from the malice which has been required in other common law crimes." *Bell, 11 Va. App. at 532, 399 S.E.2d at 452* (interpreting Va. Code Ann. § 18.2-79). It is well-settled in Virginia that "[m]alice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will. It may be directly evidenced by words, or inferred from acts and conduct which neces[s]arily result in injury. Its existence is a question of fact to be determined by [the trier of fact]." *Id. at 532-33, 399 S.E.2d at 452* ("[the defendant's] conduct in placing a foam rubber cushion in front of the door of [a] plywood structure, dousing it with gasoline, and striking a match to it showed enough ill will to support the trial judge's finding of malice").

See also Practice Commentary to Instruction No. 7.100.

ALERTS:

• If the act is done to a house usually occupied by persons lodging there, Va. Code Ann. § 18.2-77 applies. See Instruction No. 7.100.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.250

Burning Structure or Building Other Than Dwelling—Unoccupied

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [burned; by use of an explosive device or substance destroyed in whole or in part; caused to be burned or destroyed; aided, counseled or procured the burning or destruction of; set fire to anything the burning of which caused the burning of; caused to be set on fire anything, the burning of which caused the burning of; aided, counseled or procured the setting fire to anything the burning of which caused the burning of] [(describe house, building, or structure referred to in Va. Code Ann. § 18.2-79)]; **and**

(2) **That the defendant acted with malice.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P7.250

Burning Structure or Building Other Than Dwelling—Unoccupied

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-79.

CASE AUTHORITY:

Wilson v. Commonwealth, 66 Va. App. 9, 14, 781 S.E.2d 754, 756 (2016).

PRACTICE COMMENTARY: See Practice Commentary to Instruction No. 7.200.

When the evidence establishes as a matter of law that the structure is unoccupied, use this instruction rather than Instruction No. 7.200.

Va. Code Ann. 18.2-79 uses the terms "warehouse" and "storehouse." As used in this statute, the term "warehouse" is "a specific type of storage structure used in a commercial setting to hold excess goods prior to retail sale at some other location." *Wilson, 66 Va. App. at 17, 781 S.E.2d at 758.* A "storehouse," by contrast, "is a general type of structure for storing goods for a number of purposes." *Id.* Therefore, a "storehouse" is "a class of storage structures that includes both retail stores and structures used for the storage of provisions and goods." *Id. at 17–18, 781 S.E.2d at 758* (a retail country store is a "storehouse" under Va. Code Ann. § 18.2-79 where trial court's finding that grain was stored there was supported by the evidence).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.300

Burning Realty With Malice or Intent to Defraud—Person Therein

Guilt Phase:

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [burned; by use of an explosive device or substance destroyed, in whole or in part; caused to be burned or destroyed; aided, counseled or procured the burning or destruction of] **a** [; bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)]; **and**

(2) **That the defendant acted with** [malice; intent to defraud (an insurance company; name other person)]; **and**

(3) **That at the time there was a person** [therein; thereon].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of arson of an occupied structure, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime but has not proved beyond a reasonable doubt that there was a person therein at the time the crime was committed; and, if you further find from the evidence beyond a reasonable doubt that the value of the [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was $1,000 or more, then you shall find the defendant guilty of arson of an unoccupied structure, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime but has not proved beyond a reasonable doubt that there was a person therein at the time the crime was committed and that the value of the [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was $1,000 or more; and, if you further find from the evidence, beyond a reasonable doubt, that the** [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was of some value (there need be no proof of a minimum or specific value), you shall find the defendant guilty of the misdemeanor of arson of an unoccupied structure, [but you shall not fix the**

punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the first two elements of the crime or that the [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was of some value, then you shall find the defendant not guilty.**

Note:

This instruction applies to the burning or destruction of buildings, structures, and other improvements not punishable under any other part of Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia. See the Practice Commentary following Instruction No. P7.300(c).

Instruction No. P7.300(a)

Burning Realty With Malice or Intent to Defraud—Person Therein

You have found the defendant guilty of the crime of arson of an occupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P7.300(b)

Burning Realty With Malice or Intent to Defraud—No Person Therein

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P7.300(c)

Burning Realty With Malice or Intent to Defraud (Misdemeanor)

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-80.

CASE AUTHORITY:

Marable v. Commonwealth, 27 Va. App. 505, 510–13, 500 S.E.2d 233, 235–37 (1998); Simmons v. Commonwealth, 208 Va. 778, 782–83, 160 S.E.2d 569, 572–73 (1968).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-80 covers the burning or destruction of any structure, the burning or destruction of which is not punishable by other sections, and prescribes different penalties for occupied and unoccupied structures. Instruction No. 7.300 covers burning or destroying occupied structures and includes the lesser offense of burning or destroying unoccupied structures, the punishment for which is based upon the value of the property in the structure. Instruction No. 7.350 covers only the burning of unoccupied structures.

"Realty" is used in the titles of Instructions Nos. 7.300, P7.300(a), P7.300(b), and P7.300(c) to indicate that they are intended to serve as residual "catchall" instructions covering buildings, structures, or other improvements not addressed in any other part of Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia. *See* Black's Law Dictionary 1456 (10th ed. 2014) (defining "realty" as "land and anything growing on, attached to, or erected on it, that cannot be removed without injury to the land"); *see also id.* at 875 (defining "improvement" as "[a]n addition to property, usu[ally] real estate, whether permanent or not; esp[ecially] one that increases its value or that enhances its appearance").

As in Va. Code Ann. § 18.2-77, Va. Code Ann. § 18.2-80 expressly states that it is immaterial whether the property is owned by the defendant or by another person. Likewise, Va. Code Ann. § 18.2-80 makes no distinction with regard to penalty on the basis of whether the act was performed during the day or nighttime.

Where a building or structure is burned, the presumption is that the fire was caused by accident rather than by act of the accused accompanied by deliberate intent. *Simmons, 208 Va. at 782–83, 160 S.E.2d at 572–73.* See also Instruction No. 7.050.

See also Case Authority and Practice Commentary following Instruction No. 7.100.

ALERTS:

• If there is no evidence that the building, structure, or other improvement at issue was occupied at the time of the defendant's actions, Instruction No. 7.350(b), rather than this instruction, should be used.

• The instruction must be modified to describe the building, structure, or other improvement at issue with sufficient particularity so as to both clearly identify it and conform to the evidence presented. *See, e.g., Richards v. Commonwealth, 81 Va. 110, 113-14 (1885)* (persons accused of arson under predecessor version of

Code § 18.2-80 are entitled to be sufficiently informed as to the identity of the building, structure, or other improvement they are accused of burning, and failure to satisfy this requirement can result in a charge that is "defective for uncertainty").

• The language of the "Note" appearing at the end of Instruction 7.300 should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.350

Burning Realty With Malice or Intent to Defraud—No Person Therein

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [burned; by use of an explosive device or substance destroyed, in whole or in part; caused to be burned or destroyed; aided, counseled or procured the burning or destruction of] **a** [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)]; **and**

(2) **That the defendant acted with** [malice; intent to defraud (an insurance company; name other person)]; **and**

(3) **That the value of the** [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)]**, with the property contained therein, was $1,000 or more;**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you shall find the defendant guilty of the felony of arson of an unoccupied structure [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime, but has not proved beyond a reasonable doubt that the value of the bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was $1,000 or more, then if you find that the** [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was of some value (there need be no proof of a minimum or specific value), you shall find the defendant guilty of the misdemeanor of arson of an unoccupied structure, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the first two elements of the crime or that the [bridge; lock; dam; (identify building or structure of a type different from those addressed in other provisions set out in Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia)] **with the property therein was of some value, then you shall find the defendant not guilty.**

Note:

This instruction applies to the burning or destruction of buildings, structures, and

other improvements not punishable under any other part of Chapter 5 of Article 1 of Title 18.2. See the Practice Commentary following Instruction No. P7.350(b).

Instruction No. P7.350(a)

Burning Realty With Malice or Intent to Defraud—No Person Therein—Felony

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P7.350(b)

Burning Realty With Malice or Intent to Defraud—No Person Therein—Misdemeanor

You have found the defendant guilty of the crime of arson of an unoccupied structure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-80.

CASE AUTHORITY:

See Practice Commentary to Instruction No. 7.300.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-80 prescribes different penalties for unoccupied structures. If the value of the building, together with the property therein, was $1,000 or more, the crime is a Class 4 felony; if less than $1,000, the offense is a Class 1 misdemeanor. See also Practice Commentary to Instruction Nos. 7.100 and 7.300.

"Realty" is used in the titles of Instructions Nos. 7.350, P7.350(a), and P7.350(b) to indicate that they are intended to serve as residual "catchall" instructions covering buildings, structures, or other improvements not addressed in any other part of Chapter 5 of Article 1 of Title 18.2 of the Code of Virginia. *See* Black's Law Dictionary 1456 (10th ed. 2014) (defining "realty" as "land and anything growing on, attached to, or erected on it, that cannot be removed without injury to the land"); *see also id.* at 875 (defining "improvement" as "[a]n addition to property, usu[ally] real estate, whether permanent or not; esp[ecially] one that increases its value or that enhances its appearance").

ALERTS:

• If there is evidence that the building, structure, or other improvement at issue was occupied at the time of the defendant's actions, Instruction No. 7.300(c), rather than this instruction, should be used.

The instruction must be modified to describe the building, structure, or other improvement at issue with sufficient particularity so as to both clearly identify it and conform to the evidence presented. *See, e.g., Richards v. Commonwealth, 81 Va. 110, 113–14 (1885)* (persons accused of arson under predecessor version of Code § 18.2-80 are entitled to be sufficiently informed as to the identity of the building, structure, or other improvement they are accused of burning, and failure to satisfy this requirement can result in a charge that is "defective for uncertainty").

The language of the "Note" appearing at the end of Instruction 7.350 should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.400

Burning Personal Property

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [set fire to; burned; destroyed by an explosive device or substance; caused to be burned; caused to be destroyed by an explosive device or substance; aided, counseled or procured the burning of; aided, counseled or procured the destroying by an explosive device or substance of] [(identify item(s) of personal property); standing grain; (name other crop)]; **and**

(2) **That the defendant acted** [with malice; with intent to defraud an insurance company; with intent to defraud (name other person)]**; and**

(3) **That the value of the** [(identify item(s) of personal property); standing grain; (name of other crop)] **was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of the felony of arson of personal property, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime, but has not proved beyond a reasonable doubt that the value of the thing [set fire to; burned; destroyed] **was $1,000 or more, then if you find that the thing** [set fire to; burned; destroyed] **was of some value (there need be no proof of a minimum or specific value), you shall find the defendant guilty of the misdemeanor of arson of personal property, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime or has failed to prove beyond a reasonable doubt that the thing [set fire to; burned; destroyed] **was of some value, then you shall find the defendant not guilty.**

Instruction No. P7.400(a)

Burning Personal Property—Felony

You have found the defendant guilty of the crime of arson of personal property.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P7.400(b)

Burning Personal Property—Misdemeanor

You have found the defendant guilty of the crime of arson of personal property.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-81.

CASE AUTHORITY:

Schwartz v. Commonwealth, 267 Va. 751, 753–55, 594 S.E.2d 925, 926–27 (2004); Hamm v. Commonwealth, 16 Va. App. 150, 153–54, 428 S.E.2d 517, 519–20 (1993); Underwood v. Commonwealth, 218 Va. 1045, 1048, 243 S.E.2d 231, 233 (1978); Eagle Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 110–12, 140 S.E. 314, 323 (1927).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-81, like Va. Code Ann. § 18.2-80, applies to malicious burning and destruction as well as to acts done with intent to defraud an insurance company or other person. Va. Code Ann. § 18.2-81, however, covers personal property, standing grain and crops. Under both sections, the penalty increases if the property destroyed is worth more than $500.

Regarding the element of intent, in *Hamm, 16 Va. App. at 153–54, 428 S.E.2d at 520*, the court stated:

> "Malice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will." *Bell v. Commonwealth, 11 Va. App. 530, 533, 399 S.E.2d 450, 452 (1991)* (quoting *Long v. Commonwealth, 8 Va. App. 194, 198, 379 S.E.2d 473, 475–76 (1989)).* Malice, therefore, in the case of arson, is not necessarily a feeling of ill will toward another person, but may be a purposeful intent to do a wrongful act. Consequently, malice may be inferred from the fact that a person intentionally burned insured property for the purpose of defrauding or injuring an insurance carrier . . . . The jury could infer malice from the proof that Hamm burned the Thomasons' automobile for the purpose of helping them collect on a fraudulent insurance claim.

There is no presumption of arson when a person is in possession of goods recently stolen from burned or destroyed property. See *Virginia v. Commonwealth, 17 Va. App. 684, 689–90, 440 S.E.2d 438, 441 (1994); Augustine v. Commonwealth, 226 Va. 120, 123–24, 306 S.E.2d 886, 888 (1983).*

See also Case Authority and Practice Commentary following Instruction No. 7.100.

ALERTS:

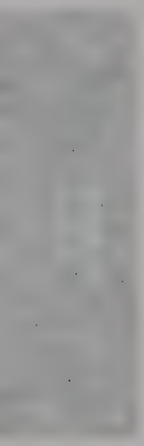
• Unlike Va. Code Ann. §§ 18.2-77, 18.2-79 and 18.2-80, Va. Code Ann. § 18.2-81 does not contain the words "whether the property of himself or another." At common law, arson, an offense against the security of the habitation, was the burning of the house of another. *Daniels v. Commonwealth, 172 Va. 583, 587–88, 1 S.E.2d 333, 335 (1939).* Proof of ownership or of an insurable interest is not an element of malicious burning under Va. Code Ann. § 18.2-81. *Hamm, 16 Va. App. at 153–54, 428 S.E.2d at 519–20.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8



Instruction No. 7.500

Burning Building or Structure While Unlawfully Therein With Intent to Commit Felony

The defendant is charged with the crime of arson. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [burned (name of building or structure); caused (name of building or structure) to be burned] **in whole or in part; and**

(2) **That at the time the defendant was in such** [building; structure] **unlawfully; and**

(3) **That the defendant intended to commit** (name of felony) **therein.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Commit Felony

(1) That the defendant [name] [burned] [caused to be burned] a building or structure] to be burned] in whole or in part; and

(2) That at the time the defendant was in such [building; structure] malicefully; and

(3) That the defendant [knowingly] [willfully] [intentionally]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements as charged, then you shall find the defendant guilty [but you shall not do so if the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements], and you shall so state in your verdict.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P7.500

Burning Building or Structure While Unlawfully Therein With Intent to Commit Felony

You have found the defendant guilty of the crime of arson.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-82.

CASE AUTHORITY:

Knight v. Commonwealth, 225 Va. 85, 89–90, 300 S.E.2d 600, 601–02 (1983).

PRACTICE COMMENTARY: If, as in *Knight, 225 Va. at 89–90, 300 S.E.2d at 601–02*, a multi-purpose structure is involved (e.g., combination store and apartment house), prosecution may be under Va. Code Ann. § 18.2-82.

Where a building or structure is burned, the presumption is that the fire was caused by accident, and the Commonwealth has the burden of proving that the fire was of incendiary origin. *Knight, 225 Va. at 89, 300 S.E.2d at 601–02*. See also Instruction No. 7.050.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.1–8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.600

Threatening to Bomb or Damage Buildings, etc.

The defendant is charged with the crime of threatening to damage (describe place of assembly, building, structure or means of transportation threatened). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant made and communicated by any means to another a threat** [to bomb; to burn; to destroy; to damage in any manner]; **and**

(2) **That the defendant did so with unlawful intent; and**

(3) **That the damage threatened was to a** [place of assembly; building; structure; means of transportation].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

The defendant is charged with the crime of [illegible] in the [illegible] place of assembly, building, structure or motor [illegible] commonwealth [illegible] jury [illegible] a true bill of the following [illegible] value.

(1) That the [illegible] and [illegible] in an [illegible] manner [illegible] to [illegible] to destroy [illegible] property;

(2) That the [illegible] unlawfully [illegible] and

(3) That the [illegible] structure, means of transportation).

If you find from the evidence that the Commonwealth has proved [illegible] reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove [illegible] doubt any element of the crime, then you shall find the defendant not guilty.

Instruction No. P7.600

Threatening to Bomb or Damage Buildings, etc.

You have found the defendant guilty of the crime of threatening to damage (describe place of assembly, building, structure or means of transportation threatened).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-83, 18.2-84.

CASE AUTHORITY:

Summerlin v. Commonwealth, 37 Va. App. 288, 297–98, 557 S.E.2d 731, 736–37 (2002); Parnell v. Commonwealth, 15 Va. App. 342, 345–47, 423 S.E.2d 834, 836–37 (1992); Perkins v. Commonwealth, 12 Va. App. 7, 15, 402 S.E.2d 229, 234 (1991).

PRACTICE COMMENTARY: This instruction deals with bomb threats. The crime of communicating false information about danger to a structure is covered by Instruction No. 7.650.

Va. Code Ann. § 18.2-83 is not unconstitutionally overbroad because it does not on its face require a *mens rea* or *scienter*. The requirement that unlawful intent be proven is implied, *Perkins, 12 Va. App. at 15, 402 S.E.2d at 234* (citing *Maye v. Commonwealth, 213 Va. 48, 49, 189 S.E.2d 350, 351 (1972)*), but proof of malice is not required under the statute. *Summerlin, 37 Va. App. at 296, 557 S.E.2d at 735–36.*

Va. Code Ann. § 18.2-83 does not require the Commonwealth to prove that the defendant intended to carry out his threat. Proof that he intended to make and communicate the threat and that the threat was made and communicated satisfies the statutory requirement. *Summerlin, 37 Va. App. at 297, 557 S.E.2d at 736.*

A threat, however, must reasonably cause the receiver to believe that the speaker will act according to his expression of intent. *Perkins v. Commonwealth, 12 Va. App. at 16, 402 S.E.2d at 234.*

ALERTS:

• If the defendant is under fifteen (15) years of age at the time of the crime, the crime is a Class 1 misdemeanor.

• Under the terms of Va. Code Ann. § 18.2-84, a person fifteen (15) years of age or over, including a parent, who causes, encourages, incites, entices or solicits any person, including a child, to commit an act prohibited by Va. Code Ann. § 18.2-83 is guilty of a Class 5 felony.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing" and "Terrorism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW & PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.650

Communicating False Information

The defendant is charged with the crime of communicating false information about danger to (describe building, structure or means of transportation). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant communicated by any means to another information as to the existence of any danger of** [bombing; burning; destruction; damage]; **and**

(2) **That the thing which the defendant reported as endangered was a** [place of assembly; building; structure; means of transportation]; **and**

(3) **That the defendant knew such information to be false.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P7.650

Communicating False Information

You have found the defendant guilty of the crime of communicating false information about danger to (describe building, structure or means of transportation).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-83, 18.2-84.

Case Authority:

Parnell v. Commonwealth, 15 Va. App. 342, 345–47, 423 S.E.2d 834, 836–37 (1992); Perkins v. Commonwealth, 12 Va. App. 7, 15–16, 402 S.E.2d 229, 234 (1991); Lambert v. Commonwealth, 9 Va. App. 67, 72–73, 383 S.E.2d 752, 755 (1989).

Practice Commentary: See Practice Commentary to Instruction No. 7.600.

Alerts:

None.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Arson and Bombing" and "Terrorism"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure § 8.4

Michie's Jurisprudence, Arson §§ 1–3, 5–8

Instruction No. 7.700

Possession of Fire Bomb Material

The defendant is charged with the crime of possessing material with which a fire bomb or explosive material or device can be made, with intent to manufacture a fire bomb or explosive material or device. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant possessed materials with which** [fire bombs, explosive materials, or devices]; **can be made; and**

(2) **That the defendant intended to manufacture** [fire bombs, explosive materials, or devices].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P7.700

Possession of Fire Bomb Material

You have found the defendant guilty of the crime of possessing material with which a fire bomb or explosive material or device can be made with the intent to manufacture a fire bomb or explosive or device.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-85.

CASE AUTHORITY:

Flanagan v. Commonwealth, 58 Va. App. 681, 699–703, 714 S.E.2d 212, 220–22 (2011).

PRACTICE COMMENTARY: For the definitions of "device," "explosive material," "fire bomb," and "hoax explosive device," see Va. Code Ann. § 18.2-85.

Va. Code Ann. § 18.2-85 also prohibits the manufacture, transportation, distribution, use and possession of fire bombs and explosive materials and devices. See Instruction No. 7.750.

The offense does not require the Commonwealth to establish that the defendant had a malicious intent. Under the statute, possession or manufacture of explosive materials or an explosive device, regardless of the defendant's intent or knowledge of whether it is unlawful, is a crime. *Flanagan, 58 Va. App. at 702–3, 714 S.E.2d at 221.*

ALERTS:

• Especially excepted from the scope of Va. Code Ann. § 18.2-85 are the authorized manufacture, transportation, distribution, use and possession of any material, substance or device by a member of the armed forces of the United States, firefighters, or law enforcement officers. Also excepted are the manufacture, transportation, distribution, use and possession of any materials, substances or devices to be used solely for scientific research, educational purposes or for any lawful purpose. Va. Code Ann. § 18.2-85. This is a statutory defense for which the defendant bears the burden of providing the supporting evidence. It is not one of the elements of the offense on which the Commonwealth has the burden of proof. *Flanagan, 58 Va. App. at 698–99, 714 S.E.2d at 220.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing" and "Terrorism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 8.4, 19.1, 19.2, 22.6

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

Instruction No. 7.750

Manufacturing, Transporting, Distributing, Possessing, or Using Fire Bomb or Explosive Material or Device

The defendant is charged with the crime of [manufacturing; knowingly and intentionally transporting; knowingly and intentionally distributing; knowingly and intentionally possessing; knowingly and intentionally using] [a fire bomb; an explosive material or device]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [manufactured; transported; distributed; possessed; used] [a fire bomb; an explosive material or device]; **and**

(2) **That the defendant did so knowingly and intentionally.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P7.750

Manufacturing, Transporting, Distributing, Possessing, or Using Fire Bomb or Explosive Material or Device

You have found the defendant guilty of the crime of [manufacturing; knowingly and intentionally transporting; knowingly and intentionally distributing; knowingly and intentionally possessing; knowingly and intentionally using] [a fire bomb; an explosive material or device].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-85.

CASE AUTHORITY:

Flanagan v. Commonwealth, 58 Va. App. 681, 699–703, 714 S.E.2d 212, 220–22 (2011).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-85 also prohibits the construction, use, placement or sending of a hoax explosive device so as to intentionally cause another to believe the device is an actual bomb or explosive. This offense is a Class 6 felony. See also Practice Commentary to Instruction No. 7.700.

The offense does not require the Commonwealth to establish that the defendant had a malicious intent. Under the statute, possession or manufacture of explosive materials or an explosive device, regardless of the defendant's intent or knowledge of whether it is unlawful, is a crime. *Flanagan, 58 Va. App. at 702–3, 714 S.E.2d at 221.*

ALERTS:

• Especially excepted from the scope of Va. Code Ann. § 18.2-85 are the authorized manufacture, transportation, distribution, use and possession of any material, substance or device by a member of the armed forces of the United States, firefighters, or law enforcement officers. Also excepted are the manufacture, transportation, distribution, use and possession of any materials, substances or devices to be used solely for scientific research, educational purposes or for any lawful purpose. Va. Code Ann. § 18.2-85. This is a statutory defense for which the defendant bears the burden of proving the supporting evidence. *Flanagan, 58 Va. App. at 698–99, 714 S.E. 2d at 220.* It is not one of the elements of the offense on which the Commonwealth has the burden of proof. *Id.*

• For a list of statutory exceptions, see Practice Commentary to Instruction No. 7.700.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Arson and Bombing" and "Terrorism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4, 19.1, 19.2, 22.6

MICHIE'S JURISPRUDENCE, Arson §§ 1–3, 5–8

CHAPTER 8

ATTEMPTS AND SOLICITATIONS

Scope Note

Instruction No. 8.100 Attempt—General Elements

Instruction No. P8.100 Attempt—General Elements

Instruction No. 8.120 Attempt—Intent

Instruction No. 8.140 Attempt—Direct Act

Instruction No. 8.160 Attempt—Failure to Commit Crime

Instruction No. 8.180 Attempt—Impossibility

Instruction No. 8.500 Solicitation

Instruction No. P8.500 Solicitation—General

SCOPE NOTE

The following instructions cover attempts and solicitations to commit crimes, two of the three inchoate categories of crimes dealt with in Chapter 3 of Title 18.2. Conspiracies, the third category of inchoate offense, are covered in **Chapter 14** of these Instructions.

Instruction No. 8.100 establishes the format for instructing the jury on the elements of any crime of attempt.

Under Article 2 of Chapter 3 of Title 18.2, punishments for attempts are divided into three categories: (1) attempts to commit Class 1 felony offenses (Va. Code Ann. § 18.2-25); (2) attempts to commit other felonies (Va. Code Ann. § 18.2-26); and (3) attempts to commit misdemeanors (Va. Code Ann. § 18.2-27). Using the crime of attempted robbery as an example, Instruction No. P8.100 establishes the format for instructing the jury on punishment. Since robbery carries a maximum punishment of life imprisonment, its attempt is punished as a Class 4 felony. Instruction No. P8.100 will need to be adjusted to reflect the correct range of punishment for the crime attempted. Va. Code Ann. § 18.2-28 provides that the punishment for an attempt may not exceed the maximum punishment which could be imposed had the offense been committed.

Instruction Nos. 8.120–8.180 define and explain the various elements of attempt. Instruction No. 8.120 explains the intent which must be proven for conviction. The definition of a "direct act" as used in element (2) of Instruction No. 8.100 is contained in Instruction No. 8.140. Instruction No. 8.160 states the established rule that failure to commit the crime, or abandonment of the criminal enterprise, is not a defense against conviction for attempt. Instruction No. 8.180 states the rule that impossibility for the defendant to have committed the attempted crime because of circumstances unknown to him is not a defense.

Solicitation, defined as the commanding, entreating, or otherwise attempting to persuade another person to commit a felony, is prohibited by Va. Code Ann. § 18.2-29.

Criminal solicitation to commit a felony other than murder is punishable as a Class 6 felony. However, it is a Class 5 felony for a person eighteen (18) or older to solicit a person under age eighteen (18) to commit a felony. Criminal solicitation to commit murder is punishable by confinement for a term not less than five years or more than forty years. Va. Code Ann. § 18.2-29.

In Instruction Nos. 8.500 and P8.500, robbery is again used as an example setting forth the elements of, and general punishment for, criminal solicitation. Instruction P8.500 will need to be adjusted to reflect the correct range of punishment for the other categories of criminal solicitation.

Instruction No. 8.100

Attempt—General Elements

The defendant is charged with the crime of attempted (name of crime). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant intended to commit (name of crime)**; and**

(2) That the defendant did a direct act toward the commission of the (name of crime) **which amounted to the beginning of the actual commission of the** (name of crime).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P8.100

Attempt—General Elements

You have found the defendant guilty of the crime of attempted (name of crime).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-25, 18.2-26, 18.2-27.

Principal Case Authority:

Winston v. Commonwealth, 268 Va. 564, 599–600, 604 S.E.2d 21, 41 (2004).

Other Relevant Decisions:

Fletcher v. Commonwealth, 72 Va. App. 493, 506–09, 849 S.E.2d 594, 600–02 (2020); Wilson v. Commonwealth, 53 Va. App. 599, 606–07, 673 S.E.2d 923, 926–27 (2009); Baldwin v. Commonwealth, 274 Va. 276, 280–82, 645 S.E.2d 433, 435–36 (2007); Jordan v. Commonwealth, 50 Va. App. 322, 327–30, 649 S.E.2d 709, 712–13 (2007); Holley v. Commonwealth, 44 Va. App. 228, 233–38, 604 S.E.2d 127, 130–32 (2004); Lewis v. Commonwealth, 43 Va. App. 126, 134–35, 596 S.E.2d 542, 546 (2004), rev'd in part on other grounds, 269 Va. 209, 608 S.E.2d 907 (2005); Stevens v. Commonwealth, 38 Va. App. 528, 533–34, 567 S.E.2d. 537, 539–40 (2002); Bloom v. Commonwealth, 34 Va. App. 364, 371–72, 542 S.E.2d 18, 21–22, aff'd on other grounds, 262 Va. 814, 554 S.E.2d 84 (2001); Brown v. Commonwealth, 33 Va. App. 296, 311–12, 533 S.E.2d 4, 11 (2000); Parsons v. Commonwealth, 32 Va. App. 576, 582–83, 529 S.E.2d 810, 813–14 (2000); Crawley v. Commonwealth, 25 Va. App. 768, 772–75, 492 S.E.2d 503, 504–06 (1997); Haywood v. Commonwealth, 20 Va. App. 562, 565, 458 S.E.2d 606, 607-08 (1995); Smith v. Commonwealth, 16 Va. App. 626, 627–29, 432 S.E.2d 1, 2 (1993); Jordan v. Commonwealth, 15 Va. App. 759, 761–62, 427 S.E.2d 231, 233 (1993); Hopson v. Commonwealth, 15 Va. App. 749, 752–53, 427 S.E.2d 221, 223 (1993); Lewis v. Commonwealth, 15 Va. App. 337, 339–41, 423 S.E.2d 371, 373–74 (1992); Fortune v. Commonwealth, 14 Va. App. 225, 228–30, 416 S.E.2d 25, 27–28 (1992); Martin v. Commonwealth, 13 Va. App. 524, 527–29, 414 S.E.2d 401, 402–04 (1992); Wynn v. Commonwealth, 5 Va. App. 283, 292–93, 362 S.E.2d 193, 198–99 (1987); Sizemore v. Commonwealth, 218 Va. 980, 983–87, 243 S.E.2d 212, 213–16 (1978); Nobles v. Commonwealth, 218 Va. 548, 551–52, 238 S.E.2d 808, 810 (1977); Martin v. Commonwealth, 217 Va. 847, 848–49, 234 S.E.2d 62, 63 (1977); Hargrave v. Commonwealth, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974); Chittum v. Commonwealth, 211 Va. 12, 15–17, 174 S.E.2d 779, 781–82 (1970); Barrett v. Commonwealth, 210 Va. 153, 156–57, 169 S.E.2d 449, 451–52 (1969); Johnson v. Commonwealth, 209 Va. 291, 293–96, 163 S.E.2d 570, 572–74 (1968); Martin v. Commonwealth, 195 Va. 1107, 1110–13, 81 S.E.2d 574, 576–78 (1954); Preddy v. Commonwealth, 184 Va. 765, 772–76, 36 S.E.2d 549, 552–53 (1946); Granberry v. Commonwealth, 184 Va. 674, 678, 36 S.E.2d 547, 548 (1946); Merritt v. Commonwealth, 164 Va. 653, 656–63, 180 S.E. 395, 396–99 (1935); Lee v. Commonwealth, 144 Va. 594, 599–604, 131 S.E. 212, 214–15 (1926); Andrews v. Commonwealth, 135 Va. 451, 459–62, 115 S.E. 558, 560–61 (1923); Thacker v. Commonwealth, 134 Va. 767, 769–72, 114 S.E. 504, 505–06 (1922); Collins v. Radford, 134 Va. 518, 535–36, 113 S.E. 735, 740–41 (1922); Hicks v. Commonwealth, 86 Va. 223, 226–27, 9 S.E. 1024, 1025 (1889).

PRACTICE COMMENTARY: This instruction was approved by the Court in *Winston, 268 Va. at 599–600, 604 S.E.2d at 41.*

The name of the attempted crime at issue should be inserted in both instructions in place of the parenthetical expression "(name of crime)".

The model punishment phase instruction is, as indicated in the Scope Note, based on the crime of robbery. The appropriate punishment for the crime at issue as outlined in Va. Code Ann. §§ 18.2-25, 18.2-26, or 18.2-27 should be used to modify the punishment instruction to reflect the correct range of punishment for the crime attempted. In conjunction with an attempt instruction, a definition of the crime attempted must be given. The definitions for the crimes described in other chapters of the **Virginia Model Jury Instructions-Criminal** should be used for this purpose.

Attempted Murder. Although a defendant may be found guilty of murder without a specific intent to kill, he cannot be guilty of attempted murder unless he has a specific intent to kill. *Baldwin, 274 Va. at 280, 645 S.E.2d at 435.* However, the phrase "specific intent to kill" is not required to be in the finding instruction for attempted capital murder so long as other instructions set forth that the defendant must have a specific intent to commit the intended crime. *Jordan, 50 Va. App. at 327–28, 649 S.E.2d at 712*; *see* Instruction No. 8.120.

Common Law Standards. While the punishments for attempts to commit offenses are fixed by statute, what constitutes an attempt must be ascertained from the common law. *Johnson, 209 Va. at 293–94, 163 S.E.2d at 572–73*; *Barrett, 210 Va. at 156, 169 S.E.2d at 451.* In general terms, an attempt in criminal law is an intended, apparent, unfinished crime. It consists of an intent to commit the crime and the doing of some direct act toward its consummation without actually committing the crime itself. See Instruction No. 8.120 with regard to "intent" and Instruction No. 8.140 defining "direct act."

Example: Alternative Attempted Murder Instructions. In *Martin, 217 Va. at 848–49, 234 S.E.2d at 63*, the court found that instructions which allowed the jury to convict the defendant of attempted murder in the first or second degree, and which provided punishment for each offense, were neither confusing nor prejudicial.

☞ ***PRACTICE POINTER:***

Regarding failure to commit the attempted crime and the impossibility of such commission, see Instructions Nos. 8.160 and 8.180. The cases cited above involve attempts to commit the following crimes:

Abduction with intent to defile—*Brown, 33 Va. App. at 311–12, 533 S.E.2d at 10.*

Assault— *Martin, 13 Va. App. at 527–29, 414 S.E.2d at 402–04* (discussing attempted criminal assault to effect escape).

Contraband—*Smith, 16 Va. App. at 627–29, 432 S.E.2d at 2* (involving imitation cocaine); *Lewis, 15 Va. App. at 339–41, 423 S.E.2d at 373–74* (involving marijuana); *Parham, 2 Va. App. at 635–38, 347 S.E.2d at 173–74* (involving methamphetamine); *Collins, 134 Va. at 535–36, 113 S.E. at 740–41* (involving

alcohol); *Andrews, 135 Va. at 459–62, 115 S.E. at 560–61* (involving alcohol).

Indecent liberties with a child—*Brooker v. Commonwealth, 41 Va. App. 609, 614–17, 587 S.E.2d 732, 734–36; Bloom, 34 Va. App. at 371–72, 542 S.E.2d at 21–22.*

Larceny—*Traish v. Commonwealth, 36 Va. App. 114, 134–37, 549 S.E.2d 5, 14–16, (2001)* (involving petit larceny).

Malicious wounding—*Fletcher, 72 Va. App. At 506–09, 849 S.E.2d at 600–02; Holley, 44 Va. App. at 234, 604 S.E.2d at 130; Crawley, 25 Va. App. at 771–75, 492 S.E.2d at 504–06.*

Murder—*Baldwin, 274 Va. at 280, 645 S.E.2d at 435; Rivers v. Commonwealth, 21 Va. App. 416, 420–21, 464 S.E.2d 549, 551 (1995); Sizemore, 218 Va. at 983–86, 243 S.E.2d at 214–16; Nobles, 218 Va. at 551–52, 238 S.E.2d at 810; Martin, 217 Va. at 848–49, 234 S.E.2d at 63; Hargrave, 214 Va. at 437, 201 S.E.2d at 598; Merritt, 164 Va. at 656–63, 180 S.E. at 396–99; Lee, 144 Va. at 599–604, 131 S.E. at 214–15; Thacker, 134 Va. at 769–72, 114 S.E. at 505–06; Hicks, 86 Va. at 226–27, 9 S.E. at 1025.*

Pandering / pimping—*Martin, 195 Va. at 1109–14, 81 S.E.2d at 576–78.*

Rape—*Fortune, 14 Va. App. at 228–230, 416 S.E.2d at 27–28; Chittum, 211 Va. at 15–17, 174 S.E.2d at 781–82; Barrett, 210 Va. at 156–57, 169 S.E.2d at 451–52; Preddy, 184 Va. at 772–76, 36 S.E.2d at 552–53; Granberry, 184 Va. at 678, 36 S.E.2d at 548.*

Robbery—*Winston, 268 Va. at 599–600, 604 S.E.2d at 41; Lewis, 43 Va. App. at 134–35, 596 S.E.2d at 546; Jordan, 15 Va. App. at 761–62, 427 S.E.2d at 233; Hopson, 15 Va. App. at 751–53, 427 S.E.2d at 223; Johnson, 209 Va. at 293–96, 163 S.E.2d at 572–74.*

Weapons possession or use—*Parsons, 32 Va. App. at 582–83, 529 S.E.2d at 813–14* (involving prohibited possessor); *Jordan, 15 Va. App. at 761–62, 427 S.E.2d at 233; Hopson, 15 Va. App. at 751–53, 427 S.E.2d at 223.*

ALERTS:

• Simple assault is a lesser included offense of attempted murder. An instruction on assault may be required in appropriate cases. *Martin, 13 Va. App. at 527–29, 414 S.E.2d at 402–04.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

Instruction No. 8.120

Attempt—Intent

The intent required to be proved in an attempted crime is the specific intent in the person's mind to commit the particular crime for which the attempt is charged. In determining whether the intent has been proved, you may consider the conduct of the person involved and all the circumstances revealed by the evidence.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Commonwealth v. Herring, 288 Va. 59, 77–78, 758 S.E.2d 225, 235 (2014); Baldwin v. Commonwealth, 274 Va. 276, 280, 645 S.E.2d 433, 435 (2007); Jordan v. Commonwealth, 50 Va. App. 322, 327–28, 649 S.E.2d 709, 712 (2007); Coles v. Commonwealth, 270 Va. 585, 590–91, 621 S.E.2d 109, 112 (2005); Holley v. Commonwealth, 44 Va. App. 228, 234, 604 S.E.2d 127, 130 (2004); Stevens v. Commonwealth, 38 Va. App. 528, 533–34, 567 S.E.2d. 537, 539–40 (2002); Bloom v. Commonwealth, 34 Va. App. 364, 371–72, 542 S.E.2d 18, 21–22, aff'd on other grounds, 262 Va. 814, 554 S.E.2d 84 (2001); Brown v. Commonwealth, 33 Va. App. 296, 311–12, 533 S.E.2d 4, 11 (2000); Nobles v. Commonwealth, 218 Va. 548, 551–52, 238 S.E.2d 808, 810 (1977); Wynn v. Commonwealth, 5 Va. App. 283, 292–93, 362 S.E.2d 193, 198–99 (1987); Green v. Commonwealth, 223 Va. 706, 711–12, 292 S.E.2d 605, 608–09 (1982); Haywood v. Commonwealth, 20 Va. App. 562, 565, 458 S.E.2d 606, 607–08 (1995); Crawley v. Commonwealth, 25 Va. App. 768, 771–75, 492 S.E.2d 503, 504–06 (1997); Hargrave v. Commonwealth, 214 Va. 436, 437, 201 S.E.2d 597, 598 (1974); Chittum v. Commonwealth, 211 Va. 12, 15–17, 174 S.E.2d 779, 781–82 (1970); Johnson v. Commonwealth, 209 Va. 291, 293–96, 163 S.E.2d 570, 572–74 (1968); Merritt v. Commonwealth, 164 Va. 653, 656–63, 180 S.E. 395, 396–99 (1935); Thacker v. Commonwealth, 134 Va. 767, 769–72, 114 S.E. 504, 505–06 (1922).

PRACTICE COMMENTARY:

Intent. The intent which must be proved is intent in fact rather than intent in law. Thus "whether the required intent exists is generally a question for the trier of fact." See generally *Nobles, 218 Va. at 551, 238 S.E.2d at 810.* Intent in fact is the purpose formed in a person's mind which may be evidenced by his conduct or statements as well as by general circumstances. *Chittum, 211 Va. at 16, 174 S.E.2d at 781.*

While an indictment charging an attempt to commit a crime should charge intent as well as an overt act (see Instruction No. 8.140, regarding "direct act"), where intent appears as part of the act alleged, it need not be explicitly stated. See *Johnson, 209 Va. at 293–94, 163 S.E.2d at 573.* As the court explained in *Merritt*, "the specific intent to commit the crime charged [may be] sufficiently alleged and might be inferred, either from the nature of the act alleged or from the use of the word 'attempt' in the indictment, as 'attempt' embraces the full meaning of 'intent,' the only distinction between an 'intent' and an 'attempt' as used [being] that the former implies purpose only, while the latter implies both purpose and the effort to carry that purpose into effect." *164 Va. at 657, 180 S.E. at 395.* Thus, in *Martin v. Commonwealth*, where the indictment included a description of various acts performed by the defendant "for the purpose of causing [a woman] to cohabit with male persons," intent to commit the offense of pandering was deemed to be

implicit in the acts alleged. *195 Va. 1107, 1113, 81 S.E.2d 574, 578.* In *Merritt*, however, intent could not be inferred from the act alleged where the indictment charged that the accused feloniously attempted to commit murder by maliciously pointing a loaded pistol at another, who was within firing range. *Merritt, 164 Va. at 663, 180 S.E. at 399.* Hence the indictment was ruled insufficient to charge an attempt. *Id.* The Court explained that while a person may be guilty of murder though there was no actual intent to kill, he cannot be guilty of an attempt to commit murder unless he has specific intent to kill. *Merritt, 164 Va. at 661, 180 S.E. at 399*; see also *Hargrave, 214 Va. at 437, 201 S.E.2d at 598* (holding that the requirement of specific intent in attempted murder was not met by use of a deadly weapon standing alone, and that such use, coupled with defendant's other conduct and utterances, was deemed sufficient to establish specific intent).

Likewise, the Supreme Court has held that while a defendant may be found guilty of murder without a specific intent to kill, he cannot be guilty of attempted murder unless he has a specific intent to kill. *Baldwin, 274 Va. at 280, 645 S.E.2d at 435.*

Purpose. The purpose which must be proved to have been formed in the defendant's mind is the intent to commit the very crime for which the attempt is charged. Such intent may be shown by the circumstances surrounding the offense, including the person's conduct and his statements. *Nobles, 218 Va. at 551–52, 238 S.E.2d at 810*; *Green, 223 Va. at 711–12, 292 S.E.2d at 608–09.*

Voluntary Intoxication. Except in the case of first degree murder, voluntary drunkenness is no excuse for a crime. Thus, in *Chittum* the court held that it was proper to refuse an instruction indicating that when specific intent is a necessary element of a crime charged, drunkenness of the defendant may be considered in determining whether he was capable of forming and entertaining the requisite intent. *Chittum, 211 Va. at 17–18, 174 S.E.2d at 782–83.*

☞ ***PRACTICE POINTER:***

To convict a defendant of attempted murder, the Commonwealth must prove a specific intent to kill. *Secret v. Commonwealth, 296 Va. 204, 228, 819 S.E.2d 234, 248 (2018).*

ALERTS:

• No crime of attempted felony murder exists in Virginia. *Goodson v. Commonwealth, 22 Va. App. 61, 72–77, 467 S.E.2d 848, 853–56 (1996).*

• The doctrine of transferred intent has no application when there is no harm to the unintended victim. *Crawley, 25 Va. App. at 773–74, 492 S.E.2d at 505–06.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Carig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

Instruction No. 8.140

Attempt—Direct Act

The direct act required to be proved in an attempted crime is an act which shows a present intention to commit the crime. The act need not be the last act prior to the actual commission of the crime, but it must be more than mere preparation.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Commonwealth v. Herring, 288 Va. 59, 78, 758 S.E.2d 225, 235–36 (2014); *Jay v. Commonwealth, 275 Va. 510, 526, 659 S.E.2d 311, 320 (2008)*; *Sizemore v. Commonwealth, 218 Va. 980, 983–86, 243 S.E.2d 212, 214–15 (1978).*

OTHER RELEVANT DECISIONS:

Ashford v. Commonwealth, 47 Va. App. 676, 681–84, 626 S.E.2d 464, 466–68 (2006); Lewis v. Commonwealth, 43 Va. App. 126, 134–35, 596 S.E.2d 542, 546 (2004), rev'd in part on other grounds, 269 Va. 209; 608 S.E.2d 907 (2005); Gray v. Commonwealth, 260 Va. 675, 681–82, 537 S.E.2d 862, 866 (2000); Bloom v. Commonwealth, 34 Va. App. 364, 371–72, 542 S.E.2d 18, 21–22, aff'd on other grounds, 262 Va. 814, 554 S.E.2d 84 (2001); Parsons v. Commonwealth, 32 Va. App. 576, 582–83, 529 S.E.2d 810, 813–14 (2000); Jordan v. Commonwealth, 15 Va. App. 759, 761–62, 427 S.E.2d 231, 233 (1993); Hopson v. Commonwealth, 15 Va. App. 749, 751–53, 427 S.E.2d 221, 223 (1993); Lewis v. Commonwealth, 15 Va. App. 337, 339–41, 423 S.E.2d 371, 373–74 (1992); Chittum v. Commonwealth, 211 Va. 12, 15–17, 174 S.E.2d 779, 781–82 (1970); Martin v. Commonwealth, 195 Va. 1107, 1110–11, 81 S.E.2d 574, 576–77 (1954); Ingram v. Commonwealth, 192 Va. 794, 802, 66 S.E.2d 846, 851 (1951); Granberry v. Commonwealth, 184 Va. 674, 678, 36 S.E.2d 547, 548 (1946); Lee v. Commonwealth, 144 Va. 594, 599–604, 131 S.E. 212, 214–15 (1926); Andrews v. Commonwealth, 135 Va. 451, 459–62, 115 S.E. 558, 560–61 (1923); Collins v. Radford, 134 Va. 518, 535–36, 113 S.E. 735, 740–41 (1922); Hicks v. Commonwealth, 86 Va. 223, 226–27, 9 S.E. 1024, 1025 (1889).

PRACTICE COMMENTARY:

Direct but Ineffectual Act. In addition to intent to commit a specific crime (*see* Instruction No. 8.120 regarding "intent"), an attempt necessarily involves a direct, ineffectual act towards the commission of that crime. It is sufficient if it is an act apparently adopted to produce the result intended. *Sizemore, 218 Va. at 983, 243 S.E.2d at 213–14.* It need not, however, be the last proximate act prior to the consummation of the crime. *Sizemore, 218 Va. at 983, 243 S.E.2d at 214; Granberry, 184 Va. at 678, 36 S.E.2d at 548*, but "the act must reach far enough towards accomplishment of the desired result to amount to the commencement of the consummation." *Jay, 275 Va. at 526, 659 S.E.2d at 320; Hicks, 86 Va. at 226–27, 9 S.E. at 1025.*

Test for Overt Act. *Jones v. Commonwealth, 70 Va. App. 307, 826 S.E.2d 908 (2019)* contains a discussion and history of case law on the issue of the quantum of evidence necessary to be sufficient to constitute an attempt to commit a crime; however, there were four concurring opinions as to the result in this specific

case—but not concurring on the majority's "new test on what constitutes an overt act."

Preparation and Attempt. As the court stated in *Chittum, 211 Va. at 16, 174 S.E.2d at 781*, it is impossible to formulate a rule which is a definite guide in determining what constitutes preparation and what amounts to legal attempts. To constitute attempt it is sufficient that the act be "apparently adopted to produce the result." *Sizemore, 218 Va. at 983, 243 S.E.2d at 214;* see also *Granberry, 184 Va. at 678, 36 S.E.2d at 548.* But "[p]reparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature." *Lewis, 15 Va. App. at 340, 423 S.E.2d at 373*; see also *Parsons, 32 Va. App. at 583, 529 S.E.2d at 813–14.*

For additional analysis on what constitutes "acts of mere preparation" and "acts standing in proximate and causal relation to what would be a consummation of the offense if its commission were completed," compare *Collins, 134 Va. at 535–36, 113 S.E. at 740–41*, and *Andrews, 135 Va. at 461–62, 115 S.E. at 561.*

Continuum of Action and Intention. *Lee* seems to suggest that the proof of overt acts necessary to sustain a conviction for attempt may vary in accordance with the strength of the evidence with respect to defendant's intent: "Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt, and this court will not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation, and what an act done toward the commission of a crime. Too many subtle distinctions have been drawn along these lines for practical purposes." *144 Va. at 600, 131 S.E. at 214.* See also *Siquina v. Commonwealth, 28 Va. App. 694, 701, 508 S.E.2d 350, 354 (1998).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

Instruction No. 8.160

Attempt—Failure to Commit Crime

It is not a defense to attempted (name of crime) **that** [the defendant voluntarily withdrew before actually committing the (name of crime); some other person or thing prevented (name of crime) from being committed].

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Collins v. Commonwealth, 283 Va. 263, 272, 720 S.E.2d 530, 534 (2012); Howard v. Commonwealth, 207 Va. 222, 229, 148 S.E.2d 800, 804–05 (1966); Slusher v. Commonwealth, 196 Va. 440, 443–44, 83 S.E.2d 719, 721 (1954); Andrews v. Commonwealth, 135 Va. 451, 459–62, 115 S.E. 558, 560–61 (1923); Collins v. Radford, 134 Va. 518, 535–38, 113 S.E. 735, 740–41 (1922); Glover v. Commonwealth, 86 Va. 382, 386, 10 S.E. 420, 421 (1889).

PRACTICE COMMENTARY:

Objection of Justice for an Attempt Crime. A defendant's attempt to obstruct justice with regard to a pending charge of attempted arson constituted the crime of felony obstruction of justice under Va. Code Ann. § 18.2-460(C). *Tanner v. Commonwealth, 72 Va. App. 86, 98–103, 841 S.E.2d 377, 383–85 (2020).*

Failure to Consummate Crime. The failure to consummate a crime is as much an element of an attempt as the intent and the performance of an overt act. See Practice Commentary to Instruction Nos. 8.120 and 8.140.

Abandonment of an Attempt. If one resolves on a criminal enterprise and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such even when he voluntarily abandons his criminal purpose. *Collins, 283 Va. at 272, 720 S.E.2d at 534*; *Howard, 207 Va. at 229, 148 S.E.2d at 804–05; Glover, 86 Va. at 386, 10 S.E. at 421.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

Instruction No. 8.180

Attempt—Impossibility

It is no defense that it was impossible for the defendant to have committed the intended crime because of facts or circumstances unknown to him. It is sufficient if the defendant's actions would have resulted in the completed crime if the facts or circumstances had been as he believed them to be.

Sources & Authority

Governing Statute:

None.

Principal Case Authority:

Hix v. Commonwealth, 270 Va. 335, 342–46, 619 S.E.2d 80, 84–86 (2005).

Other Relevant Decisions:

Collins v. Commonwealth, 283 Va. 263, 271 n.3, 720 S.E.2d 530, 534 n.3 (2012); *Traish v. Commonwealth, 36 Va. App. 114, 135–37, 549 S.E.2d 5, 15–16 (2001); Bloom v. Commonwealth, 34 Va. App. 364, 371–72, 542 S.E.2d 18, 21–22*, aff'd on other grounds, *262 Va. 814, 554 S.E.2d 84 (2001); Smith v. Commonwealth, 16 Va. App. 626, 627–29, 432 S.E.2d 1, 2 (1993); Parham v. Commonwealth, 2 Va. App. 633, 635–38, 347 S.E.2d 172, 173–74 (1986); Preddy v. Commonwealth, 184 Va. 765, 772–76, 36 S.E.2d 549, 552–53 (1946); Trent v. Commonwealth, 155 Va. 1128, 1136, 156 S.E. 567, 569 (1931); Andrews v. Commonwealth, 135 Va. 451, 459–62, 115 S.E. 558, 560–61 (1923); Collins v. Radford, 134 Va. 518, 535–38, 113 S.E. 735, 740–41 (1922); Foster v. Commonwealth, 96 Va. 306, 311, 31 S.E. 503, 505 (1898).*

Practice Commentary:

Impossibility. In order to constitute an attempt, the act attempted must not be legally impossible. However, factual impossibility is not a defense to a charge of attempt. If a fact or circumstance unknown to the defendant prevents him from committing a crime, he may be convicted of attempt. *Hix, 270 Va. at 343, 619 S.E.2d at 85; Collins, 134 Va. at 535–36, 113 S.E. at 740–41.*

Hybrid legal impossibility rejected. A mistake of fact about the legal status of some necessary element of a crime does not nullify the crime of attempt. *Hix, 270 Va. at 342 n.5, 619 S.E.2d at 84 n.5*; *Collins, 283 Va. at 271 n.3, 720 S.E.2d at 534 n.3.*

Attempt and Non-Criminal Acts. It is inherently and legally impossible to commit an attempted crime where the completed act carried out fully as intended would not constitute a crime. In this circumstance the defendant cannot be convicted of an attempted crime. *Hix, 270 Va. at 342, 619 S.E.2d at 84; Foster, 96 Va. at 311, 31 S.E. at 505.*

Legal and Physical Capacity. At common law, a boy under the age of fourteen was conclusively presumed to be incapable of committing the crime of rape and thus incapable of being convicted for attempt to rape, whatever the real facts were. *Foster, 96 Va. at 311, 31 S.E. at 505.* Va. Code Ann. § 18.2-61(B)(2) alters the common law ~~with~~ respect to a "juvenile over the age of 10 but less than 12," by creating a rebuttable presumption that such a juvenile does not possess the physical capacity to commit rape. Nonetheless, an adult who is chronically impotent can be convicted for attempted rape because "[n]either at common law nor by statute is an adult clothed with the presumption that he is incapable of committing the crime of

rape, or an attempt to rape." *Preddy, 184 Va. at 774, 36 S.E.2d at 552.*

Different Substances. Where the defendant thought he was selling methamphetamine but the substance turned out to be procaine, the sale of which is not unlawful, the defendant was properly convicted of attempting to sell methamphetamine. *Parham, 2 Va. App. at 635–38, 347 S.E.2d at 173–74.*

ALERTS:

• In a prosecution for an attempt to commit a crime, it must be proven that there was a specific intent to commit the crime. The subjective intent to possess cocaine was not proven solely upon the evidence that the defendant possessed macadamia nuts that were "cut to resemble crack cocaine." *Smith, 16 Va. App. at 627–29, 432 S.E.2d at 2.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

Instruction No. 8.500

Solicitation

The defendant is charged with the crime of solicitation to commit (name of crime)**. The Commonwealth must prove beyond a reasonable doubt that the defendant** [commanded; entreated; attempted to persuade] **another person to commit** (name of crime)**, with the intent that the** (name of crime) **be committed.**

If you find from the evidence that the Commonwealth has proved the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P8.500

Solicitation—General

You have found the defendant guilty of the crime of solicitation to commit (name of crime).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-29.

Case Authority:

Brooker v. Commonwealth, 41 Va. App. 609, 614–17, 587 S.E.2d 732, 734–36 (2003); Bloom v. Commonwealth, 34 Va. App. 364, 371–73, 542 S.E.2d 18, 21–22, aff'd on other grounds, 262 Va. 814, 554 S.E.2d 84 (2001); Branche v. Commonwealth, 25 Va. App. 480, 490, 489 S.E.2d 692, 697 (1997); Ford v. Commonwealth, 10 Va. App. 224, 226–28, 391 S.E.2d 603, 604–05 (1990); Huffman v. Commonwealth, 222 Va. 823, 826–28, 284 S.E.2d 837, 839–40 (1981); Pedersen v. City of Richmond, 219 Va. 1061, 1066–68, 254 S.E.2d 95, 99–100 (1979); Wiseman v. Commonwealth, 143 Va. 631, 639–40, 130 S.E. 249, 252 (1925).

Practice Commentary: In formulating the solicitation instruction to be given to the jury, the name of the applicable crime should be inserted above in place of "(name of crime)" and a definition of that crime should be included as a separate instruction. If the defendant is charged (1) with being age 18 or older; and (2) soliciting another person under age 18 to commit a felony other than murder, the above instruction will need to be modified to add those additional two elements.

Instruction P8.500 sets forth the general punishment for criminal solicitation. It will need to be adjusted to reflect the correct range of punishment available for the crime at issue.

Incitement and Persuasion. Solicitation comprehends inciting another in any way to commit a crime with the intent of causing the commission of the crime. The solicitation is complete, in other words, where the solicitor has attempted to persuade another to commit the crime. It does not matter whether the crime is, in fact, committed. *Brooker, 41 Va. App. at 614, 587 S.E.2d at 734–35.*

Statutory Provision and the Common Law. Va. Code Ann. § 18.2-29 applies only to solicitations to commit felonies. At common law, it was an offense to solicit another to commit a crime, which, though a misdemeanor, would defeat public justice. Because there is no statute in Virginia abolishing this common law rule, it is a crime to solicit another to commit a misdemeanor that would defeat public justice. *Wiseman, 143 Va. at 639–40, 130 S.E.2d at 252.*

Punishment. Criminal solicitation generally is punishable as a Class 6 felony, and the instruction includes this punishment. However, it is a Class 5 felony for a person eighteen (18) or older to solicit a person under age eighteen (18) to commit a felony. Solicitation to commit murder has a punishment of five years to 40 years. Va. Code Ann. § 18.2-29. Instruction No. P8.500 therefore should be modified to reflect the correct range of punishment as follows:

If the conviction is for solicitation by a person eighteen (18) or older to solicit a person under age eighteen (18) to commit a felony (other than murder), the

punishment options in the instruction should be changed to:

(1) A term of imprisonment, of not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but no more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

If the conviction is for solicitation of murder, the punishment options in the instruction should be reduced to the following single option:

(1) **A term of confinement in a state correctional facility of not less than five (5) years or more than forty (40) years.**

☞ ***PRACTICE POINTER*:**

Where the solicitation proceeds to the point of some overt act in the commission of the offense, it becomes an attempt and is indictable as such. *Wiseman, 143 Va. at 637–38, 130 S.E. at 251.*

! ***ALERTS*:**

• Solicitation does not amount to a direct act towards the commission of the crime. See *Practice* Commentary to Instruction No. 8.140.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.3, 19.4

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9

CHAPTER 9

BAD CHECKS

Scope Note

Instruction No. 9.100 **Issuing Bad Check (Felony)**

Instruction No. P9.100 **Issuing Bad Check (Felony)**

Instruction No. 9.150 **Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)**

Instruction No. P9.150 **Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)**

Instruction No. 9.200 **Issuing Bad Check (Misdemeanor)**

Instruction No. P9.200 **Issuing Bad Check (Misdemeanor)**

Instruction No. 9.300 **Inference of Intent—Notice to Maker**

Instruction No. 9.350 **Inference of Intent—No Account**

SCOPE NOTE

These instructions cover the crime of issuing bad checks. Instruction Nos. 9.100 and 9.200, based on Va. Code Ann. § 18.2-181, contain the essential elements of the crime. Instruction No. 9.100 covers felonies, while Instruction No. 9.200 is used in the case of a misdemeanor. Instruction No. 9.150 covers the separate felony of issuing two or more bad checks within a ninety (90) day period with an aggregate represented value of $1,000 or more.

Instruction Nos. 9.300 and 9.350, based on Va. Code Ann. §§ 18.2-183 and 18.2-184, deal with the inference of intent to defraud and knowledge of insufficient funds, which may arise in certain cases. Instruction No. 9.300 is used when the holder of a check sends a notice to the maker, while Instruction No. 9.350 is used when the check is drawn on a bank in which the maker has no account.

Two provisions have been excluded from these instructions: issuing bad checks on behalf of business firms or corporations in payment of wages (Va. Code Ann. § 18.2-182); and issuing two or more bad checks within a period of ninety (90) days having an aggregate value of $1,000 or more for the payment of state taxes (Va. Code Ann. § 18.2-182.1). In cases involving these crimes, it will be necessary to utilize the statutory language in order to draft the appropriate instructions.

Instruction No. 9.100

Issuing Bad Check (Felony)

The defendant is charged with the crime of issuing a bad [check; draft; order for the payment of money]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [made; drew; uttered; delivered] **a** [check; draft; order for the payment of money] **on a** [bank; banking institution; trust company; depository]**; and**

(2) **That the defendant knew at the time he acted that there were not sufficient** [funds in; credit with] **the** [bank; banking institution; trust company; depository] **for the payment of the** [check; draft; order for the payment of money]**; and**

(3) **That the defendant acted with intent to defraud; and**

(4) **That the** [check; draft; order for the payment of money] **was in the amount of $1,000 or more; and**

(5) **That the** [check; draft; order for the payment of money] **was in payment as a present consideration** [for goods or services]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P9.100

Issuing Bad Check (Felony)

You have found the defendant guilty of the crime of issuing a bad [check; draft; order for the payment of money]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-181.

CASE AUTHORITY:

McGinnis v. Commonwealth, 296 Va. 489, 821 S.E.2d 551 (2018); Sykes v. Commonwealth, 42 Va. App. 581, 586–88, 593 S.E.2d 545, 548–49 (2004); Wileman v. Commonwealth, 24 Va. App. 642, 649–52, 484 S.E.2d 621, 625–26 (1997); Bagheri v. Commonwealth, 12 Va. App. 1071, 1075–77, 408 S.E.2d 259, 262–63 (1991); Sylvestre v. Commonwealth, 10 Va. App. 253, 258–59, 391 S.E.2d 336, 339–40 (1990); Bray v. Commonwealth, 9 Va. App. 417, 420–24, 388 S.E.2d 837, 838–40 (1990); Edwards v. Commonwealth, 227 Va. 349, 351–53, 315 S.E.2d 239, 240–41 (1984); Payne v. Commonwealth, 222 Va. 485, 487–89, 281 S.E.2d 873, 874–75 (1981); Warren v. Commonwealth, 219 Va. 416, 419, 247 S.E.2d 692, 693 (1978); Patterson v. Commonwealth, 216 Va. 306, 307–08, 218 S.E.2d 435, 436–37 (1975); Huntt v. Commonwealth, 212 Va. 737, 739–40, 187 S.E.2d 183, 185–86 (1972); Cook v. Commonwealth, 178 Va. 251, 257–59, 16 S.E.2d 635, 637–38 (1941).

PRACTICE COMMENTARY: The Commonwealth must prove both the intent to defraud and the knowledge of insufficient funds at the time of drawing or uttering the check. *Huntt, 212 Va. at 739, 187 S.E.2d at 185.* Va. Code Ann. § 18.2-183 "creates a rebuttable presumption of the necessary intent and knowledge if a dishonored check is not paid within five days after giving of the notice [of dishonor to the drawer] specified in the statute." *Id. at 739, 187 S.E.2d at 186* (discussing the predecessor to Va. Code Ann. § 18.2-183).

Receiving Something for the Check. To prove a bad check offense, it need not be shown that any material item was received in consideration for the check. *Payne, 222 Va. at 488–489, 281 S.E.2d at 874–75* (partner issued a bad check to another partner for partnership assets jointly owned by both partners); *Bray, 9 Va. App. at 423–424, 388 S.E.2d at 839–40* (tenant issued a bad check to landlord for security deposit).

Under Va. Code Ann.§ 18.2-181, "larceny by worthless check is not limited to checks passed as present consideration for goods and services." *McGinnis v. Commonwealth, 296 Va. 489, 507, 821 S.E.2d 700, 700–01 (2018)* (bad checks issued for event planning services).

Effect of Subsequent Acts. The crime of drawing a bad check is committed at the time the check is drawn. "Subsequent acts of the drawer are of evidential value only in helping to establish the operative fact of fraudulent intent. . . . The acts of the drawer in his dealings with the holder after issuing the check are relevant only insofar as they tend to prove or disprove the actual commission of the crime on the date upon which the check was drawn." *Cook, 178 Va. at 259–60, 16 S.E.2d at 638.*

The offense of drawing a bad check "is complete when, with the requisite intent, a person utters a check he knows to be worthless." *Warren, 219 Va. at 422, 247*

S.E.2d at 695. Thus, "the discovery by the payee that a check is worthless before a purchase transaction is completed does not preclude a conviction under [Va. Code Ann. § 18.2-181]." *Id.*

Punishment. Although Va. Code Ann. § 18.2-181 defines this offense as larceny, the specified punishment is that for a Class 6 felony (see Va. Code Ann. § 18.2-10) and is not the same as that for larceny (see Va. Code Ann. § 18.2-95).

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 19.2-270.3 provides that certain information listed in the statute related to the identity of the party presenting the bad instrument shall be admissible in any prosecution under Va. Code Ann. §§ 18.2-181 or 18.2-182. The statute also creates a permissible inference that the person whose identifying information is introduced into evidence pursuant to the statute was the person who delivered the instrument to the payee, cashing party or its representative. However, this statute does not create a rebuttable presumption on the issue of identity. *Edwards, 227 Va. at 352–53, 315 S.E.2d at 240–41.*

The United States Supreme Court has held that certain presumptions in the criminal context offend due process. *Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).* The Supreme Court of Virginia generally has treated such presumptions as permissive inferences, notwithstanding express statutory language of "presumption." See, e.g., *Wilson v. Commonwealth, 225 Va. 33, 43–44, 301 S.E.2d 1 (1983).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, *Criminal Offenses and Defenses in Virginia*, "Check Offenses"

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11

RESEARCH REFERENCES:

John E. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11.

Instruction No. 9.150

Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)

The defendant is charged with the crime of issuing two or more bad [checks; drafts; orders for the payment of money] **within a period of ninety (90) days. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [wrote; uttered; delivered] **two or more** [checks; drafts; orders for the payment of money] **on the same account of a** [bank; banking institution; trust company; depository]**; and**

(2) **That each** [check; draft; order for the payment of money] **was made payable to the same** [corporation; firm; person]; **and**

(3) **That the defendant knew at each of the times he acted that there were not sufficient** [funds in; credit with] **the** [bank; banking institution; trust company; depository] **on which the** [check; draft; order for the payment of money] **was written to cover payment of the** [check; draft; order for the payment of money]**; and**

(4) **That each time the defendant acted with intent to defraud; and**

(5) **That the** [checks; drafts; orders for the payment of money] **were issued within a period of ninety (90) days; and**

(6) **That the** [checks; drafts; orders for the payment of money] **had an aggregate represented value of $1,000 or more; and**

(7) **That each** [check; draft; order for the payment of money] **was in payment as a present consideration for goods or services.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 9.150

Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)

The defendant is charged with the crime of issuing two or more bad [checks; drafts; orders for the payment of money] within a period of ninety (90) days. The Commonwealth must prove beyond a reasonable doubt proof of the following elements of that crime:

(1) That the defendant [wrote; uttered; delivered; issued; made; drafts; orders for the payment of money] on the same account of a [bank; banking institution; trust company; depository]; and

(2) That [illegible] payment of money; and

(3) That the defendant knew at each of the times he acted that there was not sufficient [illegible] the [bank; banking institution; [illegible]] [illegible] payment of money]; and

(4) That each time the defendant acted with intent to defraud; and

(5) That the [checks; drafts; orders for the payment of money] were issued within a period of ninety (90) days; and

(6) That the [illegible] represented value of $1,000 or more; and

(7) That each [check; draft; order for the payment of money] was in payment of a present consideration for goods or services.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt proof of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you had found the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P9.150

Issuing Two or More Bad Checks Within Ninety (90) Day Period (Felony)

You have found the defendant guilty of the crime of issuing two or more bad [checks; drafts; orders for the payment of money] **within a period of ninety (90) days.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-181.1.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See the Practice Commentary to Instruction No. 9.100.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11

Instruction No. 9.200

Issuing Bad Check (Misdemeanor)

Guilt Phase:

The defendant is charged with the crime of issuing a bad [check; draft; order for the payment of money]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [made; drew; uttered; delivered] **a** [check; draft; order for the payment of money] **on a** [bank; banking house; trust company; depository]**; and**

(2) **That the defendant knew at the time he acted that there were not sufficient** [funds in; credit with] **the** [bank; banking house, trust company; depository] **for the payment of the** [check; draft; order for the payment of money]**; and**

(3) **That the defendant acted with intent to defraud; and**

(4) **That the** [check; draft; order for the payment of money] **was in payment as a present consideration** [for goods or services]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

for the payment of money] on a [bank; banking house; trust company; depository]; and

(2) That the defendant knew at the time he acted that there were not sufficient [funds on deposit with the [bank; banking house; trust company; depository] in the account on which it drew] [credit with the drawee] for the payment of such [draft] [check]; and

(3) That the defendant acted with intent to defraud; and

(4) That the [bank; banking house; trust company; depository in payment of a present consideration [for goods or services].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you must find the defendant guilty; but you shall not do so if you have a reasonable doubt as to any one or more of the above elements of the crime. You are not to consider any one piece of the evidence separately, but you are to consider all the evidence in the case in order to determine whether the Commonwealth has proved beyond a reasonable doubt each and every element of the crime. You must find the defendant guilty if you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime; but you must find the defendant not guilty if you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime. You are not to consider any one piece of the evidence separately, but you are to consider all the evidence in the case in order to determine whether the Commonwealth has proved beyond a reasonable doubt each and every element of the crime. You

Instruction No. P9.200

Issuing Bad Check (Misdemeanor)

You have found the defendant guilty of the crime of issuing a bad [check; draft; order for the payment of money]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-181.

Case Authority:

Foster v. Commonwealth, 44 Va. App. 574, 576, 606 S.E.2d 518, 519 (2004), aff'd, 271 Va. 235, 238, 623 S.E.2d 902, 903 (2006); Sykes v. Commonwealth, 42 Va. App. 581, 586–88, 593 S.E.2d 545, 548–49 (2004); Sylvestre v. Commonwealth, 10 Va. App. 253, 258–59, 391 S.E.2d 336, 339–40 (1990); Bray v. Commonwealth, 9 Va. App. 417, 420–24, 388 S.E.2d 837, 838–40 (1990); Edwards v. Commonwealth, 227 Va. 349, 351–53, 315 S.E.2d 239, 240–41 (1984); Payne v. Commonwealth, 222 Va. 485, 487–89, 281 S.E.2d 873, 874–75 (1981); Warren v. Commonwealth, 219 Va. 416, 419, 247 S.E.2d 692, 693 (1978); Patterson v. Commonwealth, 216 Va. 306, 307–08, 218 S.E.2d 435, 436–37 (1975); Huntt v. Commonwealth, 212 Va. 737, 739–40, 187 S.E.2d 183, 185–86 (1972); Cook v. Commonwealth, 178 Va. 251, 257–59, 16 S.E.2d 635, 637–38 (1941).

Practice Commentary: The Commonwealth must prove both the intent to defraud and the knowledge of insufficient funds at the time of drawing or uttering the check. *Huntt, 212 Va. at 739, 187 S.E.2d at 185.* Va. Code Ann. § 18.2-183 "creates a rebuttable presumption of the necessary intent and knowledge if a dishonored check is not paid within five days after giving of the notice [of dishonor to the drawer] specified in the statute." *Id. at 739, 187 S.E.2d at 186* (discussing the predecessor to Va. Code Ann. § 18.2-183).

Receiving Something for the Check. To prove a bad check offense, it need not be shown that any material item was received in consideration for the check. *Payne, 222 Va. at 488–489, 281 S.E.2d at 874–75* (partner issued a bad check to another partner for partnership assets jointly owned by both partners); *Bray, 9 Va. App. at 423–424, 388 S.E.2d at 839–40* (tenant issued a bad check to landlord for security deposit).

Under Va. Code Ann. § 18.2-181, "larceny by worthless check is not limited to checks passed as present consideration for goods and services." *McGinnis v. Commonwealth, 296 Va. 489, 507, 821 S.E.2d 700, 700–01 (2018)* (bad checks issued for event planning services).

Effect of Subsequent Acts. The crime of drawing a bad check is committed at the time the check is drawn. "Subsequent acts of the drawer are of evidential value only in helping to establish the operative fact of fraudulent intent. . . . The acts of the drawer in his dealings with the holder after issuing the check are relevant only insofar as they tend to prove or disprove the actual commission of the crime on the date upon which the check was drawn." *Cook, 178 Va. at 259–60, 16 S.E.2d at 638.*

The offense of drawing a bad check "is complete when, with the requisite intent, a person utters a check he knows to be worthless." *Warren, 219 Va. at 22, 247 S.E.2d at 695.* Thus, "the discovery by the payee that a check is worthless before

a purchase transaction is completed does not preclude a conviction under [Va. Code Ann. 18.2-181]." *Id.*

Statute of Limitations. Generally, the statute of limitations for a misdemeanor is one year, but petit larceny is subject to a five-year limitation. See Va. Code Ann. § 19.2-8. The statute of limitations for issuing a bad check (misdemeanor) is five years, the same as petit larceny. *Foster, 44 Va. App. at 582, 606 S.E.2d at 521–22, aff'd, 271 Va. at 238, 623 S.E.2d at 903.*

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 19.2-270.3 provides that certain information listed in the statute related to the identity of the party presenting the bad instrument shall be admissible in any prosecution under Va. Code Ann. §§ 18.2-181 or 18.2-182. The statute also creates a permissible inference that the person whose identifying information is introduced into evidence pursuant to the statute was the person who delivered the instrument to the payee. However, this statute does not create a rebuttable presumption on the issue of identity. *Edwards, 227 Va. at 352–53, 315 S.E.2d at 240-41.*

The United States Supreme Court has held that certain presumptions in the criminal context offend due process. *Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).* The Supreme Court of Virginia generally has treated such presumptions as permissive inferences, notwithstanding express statutory language of "presumption." See, e.g., *Wilson v. Commonwealth, 225 Va. 33, 43–44, 301 S.E.2d 1 (1983).*

! ***ALERTS:***

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11

Instruction No. 9.300

Inference of Intent—Notice to Maker

If the holder of a [check; draft; order for payment of money] **sends a notice that such** [check; draft; order for payment of money] **has not been paid to the maker of a** [check; draft; order for payment of money] **by certified or registered mail:**

(1) **to his last known address, evidenced by return receipt, and the holder is not paid within five days of receipt of such notice, or**

(2) **to the** [written; printed] **address shown on the face of the** [check; draft; order for payment of money]**, with or without return receipt requested, and the holder is not paid within five days of the sending of such notice,**

you may, but are not required, to infer that the maker had the intent to defraud or had knowledge of insufficient [funds in; credit with] **the** [bank; banking institution; trust company; depository]**.**

The notation ["not sufficient funds"; "uncollected funds"; "account closed"; "no account in this name;" "NSF"] **or words of similar import attached to or stamped on a check which is returned by the bank is evidence that such notation is true.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-183, 18.2-184.

PRINCIPAL CASE AUTHORITY:

Rinkov v. Commonwealth, 213 Va. 307, 309–11, 191 S.E.2d 731, 733 (1972).

OTHER RELEVANT DECISIONS:

Bagheri v. Commonwealth, 12 Va. App. 1071, 1074, 408 S.E.2d 259, 262 (1991); Huntt v. Commonwealth, 212 Va. 737, 739, 187 S.E.2d 183, 185–86 (1972); Cook v. Commonwealth, 178 Va. 251, 257–58, 16 S.E.2d 635, 637–38 (1941).

PRACTICE COMMENTARY: For the inference to arise that the check was made, drawn or uttered with intent to defraud, or with knowledge of insufficient funds, the evidence must show (1) that the notice sent by certified or registered mail to the last known address of the maker actually reached that address and was accepted by someone at that address, *Rinkov, 213 Va. at 310, 191 S.E.2d at 733*, or (2) that the notice was sent by certified or registered mail to the printed or written address of the maker or drawer as it appears on the check, in which case it is irrelevant if the notice is returned undelivered, Va. Code. Ann. § 18.2-183.

Va. Code Ann. § 18.2-183 was adopted because of "the difficulty encountered in proving the requisite intent to defraud and knowledge of insufficient funds." *Huntt, 212 Va. at 739, 187 S.E.2d at 186.* Thus, when a check is not paid by the defendant within five days after he has received the requisite notice, an inference that may be drawn from the lack of payment is that the defendant possessed the fraudulent intent and the knowledge of insufficient funds, the two elements central to the crime.

PRACTICE POINTER:

Payment of the check within the five-day period is not a bar to prosecution. Nevertheless, that payment is evidence that rebuts the presumption of fraudulent intent. *Cook, 178 Va. at 258, 16 S.E.2d at 638.*

ALERTS:

• Va. Code Ann. § 18.2-183 provides that if the check, draft, or order shows on its face a printed or written address of the maker or drawer, the notice, when sent by certified or registered mail to such address, with or without return receipt requested, shall be deemed sufficient and equivalent to notice having been received by the maker or drawer, whether such notice shall be returned undelivered or not.

When a check is drawn on a bank in which the maker or drawer has no account, it shall be presumed that such check was issued with intent to defraud, and the five-day notice shall not be required. Va. Code Ann. § 18.2-183. See Instruction No. 9.350.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11

Instruction No. 9.350

Inference of Intent—No Account

When the check is drawn on a bank in which the [maker; drawer] **has no account, you may infer, but are not required to infer, that the check was issued with the intent to defraud.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-183.

CASE AUTHORITY:

Sykes v. Commonwealth, 42 Va. App. 581, 587–88, 593 S.E.2d 545, 548 (2004); Patterson v. Commonwealth, 216 Va. 306, 308, 218 S.E.2d 435, 436 (1975).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-183 creates a rebuttable presumption of intent when the maker does not have an account in the bank where the check was drawn. *Patterson, 216 Va. at 308, 218 S.E.2d at 436.*

This part of the statute has been construed as defining a rule of evidence that may help the Commonwealth prove the necessary fraudulent intent. *Sykes, 42 Va. App. at 587, 593 S.E.2d at 548.*

ALERTS:

• The statute provides that it "shall be presumed" that the check was issued with the intent to defraud when the check is drawn on a bank in which the maker or drawer has no account. In light of the case law from the United States Supreme Court on the issue of mandatory presumptions, see *Sandstrom v. Montana, 442 U.S. 510, 512, 523–24 (1979)* and *Connecticut v. Johnson, 460 U.S. 73, 84, 90 (1983)* (plurality), the instruction has been drafted to state that the jury "may infer" intent. The Supreme Court of Virginia generally has treated such presumptions as permissive inferences, notwithstanding express statutory language of "presumption." See, e.g., *Wilson v. Commonwealth, 225 Va. 33, 43–44, 301 S.E.2d 1 (1983).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3, 14.1–14.4

MICHIE'S JURISPRUDENCE, Banks and Banking § 89; and Forgery §§ 8, 10, 11

CHAPTER 10

BREACH OF PEACE

Scope Note

Instruction No. 10.100 Use of Profane, Threatening, or Indecent Language Over Telephone, Etc.

Instruction No. P10.100 Use of Profane, Threatening, or Indecent Language Over Telephone, Etc.

Instruction No. 10.200 Burning of Object With Intent to Intimidate—Private Property

Instruction No. P10.200 Burning of Object With Intent to Intimidate—Private Property

Instruction No. 10.220 Burning of Object With Intent to Intimidate—Highway or Public Place

Instruction No. P10.220 Burning of Object With Intent to Intimidate—Highway or Public Place

Instruction No. 10.230 Public Place—Definition

Instruction No. 10.300 Placing a Swastika With Intent to Intimidate

Instruction No. P10.300 Placing a Swastika With Intent to Intimidate

Instruction No. 10.400(a) Unlawful Paramilitary Activity—Training, Teaching, or Demonstrating

Instruction No. 10.400(b) Unlawful Paramilitary Activity—Assembling for Training, Practice, or Instruction

Instruction No. 10.400(c) Unlawful Paramilitary Activity—Brandishing Firearm While Assembled to Intimidate

Instruction No. P10.400 Unlawful Paramilitary Activity

Instruction No. 10.500 Causing Telephone or Pager to Ring with Intent to Annoy—Emergency

Instruction No. P10.500 Causing Telephone or Pager to Ring with Intent to Annoy—Emergency

SCOPE NOTE

The instructions contained in this chapter cover statutes that make unlawful the use of certain language and other forms of expression intended to harass or intimidate. Instruction No. 10.100 pertains to use of obscene language over the telephone or citizens band radio in violation of Va. Code Ann. § 18.2-427, a Class 1 misdemeanor. Instruction No. 10.200 and Instruction 10.220 pertain to burning an object with intent to intimidate in violation of Va. Code Ann. § 18.2-423.01, a Class 6 felony. Instruction No. 10.230 defines public place under Va. Code 18.2-423.2. Instruction No. 10.300 pertains to placing a swastika with intent to intimidate in violation of Va. Code Ann. § 18.2-423.1, a Class 6 felony, and Instruction Nos. 10.400(a) and (b) pertain to unlawful paramilitary activity in violation of Va. Code Ann. § 18.2-433.2, a Class 5 felony. Instruction No. P10.500 pertains to causing a telephone or a pager to ring with the intent to annoy in violation of Va. Code Ann. § 18.2-429.

Instruction No. 10.100

Use of Profane, Threatening, or Indecent Language Over Telephone, Etc.

The defendant is charged with the crime of using profane, threatening, or indecent language over a [telephone; wireless telecommunications device; citizens band radio]**. The Commonwealth must prove beyond a reasonable doubt each of the elements of that crime:**

(1) **That the defendant** [talked on; used; produced a visual or electronic message using] **a** [telephone; wireless telecommunications device; citizens band radio]**; and**

(2) **That in doing so, he** [used indecent, vulgar, profane, lewd, lascivious language that was obscene; made a suggestion or proposal of an obscene nature; threatened an illegal or immoral act]**; and**

(3) **That he did so with the intent to coerce, intimidate, or harass** (name of person)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P10.100

Use of Profane, Threatening, or Indecent Language Over Telephone, Etc.

You have found the defendant guilty of the crime of use of profane, threatening, or indecent language over the [telephone; wireless telecommunications device; citizens band radio]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific amount of time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-427.

CASE AUTHORITY:

Barson v. Commonwealth, 284 Va. 67, 73–74, 726 S.E.2d 292, 295–96 (2012); *Rives v. Commonwealth, 284 Va. 1, 3, 726 S.E.2d 248, 250 (2012)*; *Lofgren v. Commonwealth, 55 Va. App. 116, 118–22, 684 S.E.2d 223, 225–26 (2009)*; *Allman v. Commonwealth, 43 Va. App. 104, 112–13, 596 S.E.2d 531, 534–35 (2004)*; *Perkins v. Commonwealth, 12 Va. App. 7, 14, 402 S.E.2d 229, 233 (1991)*.

PRACTICE COMMENTARY: In *Perkins*, the Court of Appeals upheld the constitutionality of Va. Code Ann. § 18.2-427 against a challenge by the appellant that the statute was facially overbroad. In doing so, the court specifically concluded that the legislature intended to narrow the scope of the speech phrases "obscene, vulgar, profane, lewd, lascivious or indecent" to that which is obscene. *12 Va. App. at 14, 402 S.E.2d at 233*. Citing its holding in *Perkins*, the Court of Appeals in *Allman* later held that an appellant's use of the word "pussy" in the context of that case, while tasteless and rude, was not "obscene," and therefore not a violation of the statute regardless of whether appellant acted with the intent to coerce, intimidate, or harass when using that term. *43 Va. App. at 112–13, 596 S.E.2d at 535–36*. In *Barson, 284 Va. at 73–74, 726 S.E.2d at 295–96*, the Supreme Court of Virginia endorsed the interpretation of the term "obscene" adopted in *Allman*.

In *Rives*, the Supreme Court explained that the statute proscribes three separate species of conduct in the use of telephone and radio communications, when accompanied by the intent to coerce, intimidate, or harass: (1) obscene language; (2) obscene suggestions or proposals; and (3) threats of illegal or immoral acts. *284 Va. at 3, 726 S.E.2d at 250*. The first and second offenses are qualified by the word "obscene." The third offense, proscribing threats, is not so limited. *Id.*

"Over any telephone" includes "any electronically transmitted communication producing a visual or electronic message that is received or transmitted by cellular telephone or other wireless telecommunications device." Va. Code Ann. § 18.2-427.

ALERTS:

• When giving this instruction in cases where the charged conduct includes the use of obscene or lascivious language or the making of an obscene suggestion or proposal, it is recommended that the instructions defining "obscene," Instruction No. 40.100, and "lascivious," Instruction No. 29.200, also be given.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Communications Offenses"; "Disorderly Conduct and Places"; and "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; Constitutional Law § 78; and Telegraph and Telephone Companies § 2

Instruction No. 10.200

Burning of Object With Intent to Intimidate—Private Property

The defendant is charged with the crime of burning an object on the private property of another without permission. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [burned; caused to be burned] **an object; and**

(2) That he did so on the private property of another without permission; and

(3) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

property of another without permission. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [burned; caused to be burned] an object; and

(2) That he did so on the private property of another without permission; and

(3) That he did so with the intent to intimidate any person or group of persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. [But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, you shall find the defendant not guilty.

Instruction No. P10.200

Burning of Object With Intent to Intimidate—Private Property

You have found the defendant guilty of the crime of burning an object on the private property of another person without permission.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-423.01(A).

CASE AUTHORITY:

Elliott v. Commonwealth, 267 Va. 464, 471–72, 593 S.E.2d 263, 267–68 (2004); Black v. Commonwealth, 262 Va. 764, 778, 553 S.E.2d 738, 746 (2001), aff'd in part, vacated in part, and remanded, Virginia v. Black, 538 U.S. 343, 364–67 (2003).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-423.01(A) concerns the burning of any object on the private property of another. The cases cited above all concerned a different statute, Va. Code Ann. § 18.2-423, which specifically governs the burning of a cross on the property of another, a highway, or other public place. Va. Code Ann. § 18.2-423 reads:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

The second paragraph of Va. Code Ann. § 18.2-423, and the corresponding Virginia Model Jury Instruction in place at the time, were the subject of litigation before the Supreme Court of Virginia in *Black v. Commonwealth, 262 Va. 764, 553 S.E.2d 738 (2001)*, and the Supreme Court of the United States in *Virginia v. Black, 538 U.S. 343 (2003).*

In *Virginia v. Black*, the Supreme Court of the United States held that "[t]he prima facie evidence provision, as interpreted by the jury instruction, render[ed] [Va. Code Ann. § 18.2-423] unconstitutional." *538 U.S. at 364–66* (reiterating that cross burning has not always been utilized for intimidation purposes). Va. Code Ann. § 18.2-423.01, the subject of this instruction, was enacted to remedy the offending prima facie evidence provision.

In the year following the U.S. Supreme Court's holding, the Supreme Court of Virginia, in *Elliott*, considered whether the offending provision of Va. Code Ann. § 18.2-423, which the U.S. Supreme Court had determined to be unconstitutional, was severable from the rest of the statute. The *Elliott* court held that it was indeed severable. *267 Va. at 471–72, 593 S.E.2d at 267–68*. Accordingly, Va. Code Ann. § 18.2-423 has not been repealed or overruled as a whole and remains good law, with the exception of the unconstitutional prima facie evidence provision.

Since *Elliott* was decided in 2004, there have yet to be any cases in the Supreme Court of Virginia or the Court of Appeals of Virginia addressing Va. Code Ann. § 18.2-423.01. Therefore, although technically concerning a different statute, the

Elliott and *Black* citations are included to provide context.

***ALERTS*:**

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"; and "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; and Constitutional Law § 78

Instruction No. 10.220

Burning of Object With Intent to Intimidate—Highway or Public Place

The defendant is charged with the crime of burning an object [on a highway; in a public place] **with the intent to intimidate any person or group of persons. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [burned; caused to be burned] **an object; and**

(2) That he did so [on a highway; in a public place]**; and**

(3) That he did so with the intent to intimidate any person or group of persons; and

(4) That the burning was done in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 11.230

The defendant is charged with the crime of burning an object [on a highway; in a public place; in a manner to endanger any person or property; and a fire was started as a result of the burning].

To find the defendant guilty of this crime, you must find from the evidence that:

(1) That he did so [on a highway; in a public place]; and

(2) That he did so with the intent to intimidate any person or group of persons; and

(3) That the burning was done in a manner having a direct tendency to place another person in reasonable fear or apprehension of death or bodily injury.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P10.220

Burning of Object With Intent to Intimidate—Highway or Public Place

You have found the defendant guilty of the crime of burning an object [on a highway; in a public place]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-423.01(B).

CASE AUTHORITY:

Elliott v. Commonwealth, 267 Va. 464, 471–72, 593 S.E.2d 263, 267–68 (2004); Black v. Commonwealth, 262 Va. 764, 778, 553 S.E.2d 738, 746 (2001),aff'd in part, vacated in part, and remanded, Virginia v. Black, 538 U.S. 343, 364–67 (2003).

PRACTICE COMMENTARY: See Practice Commentary to Instruction No. 10.200.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"; and "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; and Constitutional Law § 78

Instruction No. 10.230

Public Place—Definition

A public place includes private property when the [(name and/or description of object); (name and/or description of symbol); noose] **is displayed on private property and is used as a means to communicate it to the public and is visible to persons who are within the viewpoint of the communication.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Turner v. Commonwealth, 295 Va. 104, 109–13, 809 S.E.2d 679, 682–84 (2018).

PRACTICE COMMENTARY: In *Turner*, the Supreme Court of Virginia held that a noose displayed on private property that was clearly visible by members of the public from a street adjacent to the private property was displayed in a public place. The Supreme Court of Virginia cited *Hackney v. Commonwealth, 186 Va. 888, 45 S.E.2d 241 (1941)*, and held that the term "public place" as used in Va. Code Ann. § 18.2-423.2(B) includes "private property generally visible by the public from some other location." *Turner, 295 Va. at 112, 809 S.E.2d at 683.*

ALERTS:

• This jury instruction should not be utilized in other contexts where there is an applicable statutory definition. The Virginia Code specifically defines "public place" in some other contexts. See, for example, Va. Code Ann. § 4.1-100.

Instruction No. 10.300

Placing a Swastika With Intent to Intimidate

The defendant is charged with the crime of placing a swastika [on a building or place used for religious worship; on a school, educational facility or community center owned or operated by a religious body]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [placed; caused to be placed] **a swastika** [on a building or place used for religious worship; on a school, educational facility or community center owned or operated by a religious body]**; and**

(2) **That he did so with intent to intimidate another person or group of persons.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P10.300

Placing a Swastika With Intent to Intimidate

You have found the defendant guilty of the crime of placing a swastika [on a church, synagogue or other building or place used for religious worship; on a school, educational facility or community center owned or operated by a church or religious body]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-423.1.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: As to the constitutionality of a similar statute, see *Virginia v. Black, 538 U.S. 343 (2003)*, and *Elliott v. Commonwealth, 267 Va. 464, 593 S.E.2d 263 (2004)*. For more context, please see the Practice Commentary of Instructions Nos. P.10.200 and P10.220.

ALERTS:

• Like Va. Code Ann. § 18.2-423, Va. Code Ann. § 18.2-423.1 contains a prima facie evidence provision. See *Elliott, 267 Va. at 471–72, 593 S.E.2d at 267–68* (holding that the constitutionally problematic prima facie clause was severable from the cross-burning statute). The constitutionality of the prima facie clause of Va. Code Ann. § 18.2-423.1 has not been adjudicated.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"; "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; and Constitutional Law § 78

Instruction No. 10.400(a)

Unlawful Paramilitary Activity—Training, Teaching, or Demonstrating

Guilt Phase:

The defendant is charged with the crime of unlawful paramilitary activity. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [taught; demonstrated] **to any other person the** [use; application; making] **of any** [firearm; explosive; incendiary device; technique capable of causing injury or death to persons]**; and**

(2) **That he did so knowing, or having reason to know, or intending that the training acquired from such** [teaching; demonstration] **would be employed** [for use in; in furtherance of] **a civil disorder.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 10.400(b)

Unlawful Paramilitary Activity—Assembling for Training, Practice, or Instruction

The defendant is charged with the crime of unlawful paramilitary activity. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant assembled with one or more persons for the purpose of** [training with; practicing with; being instructed in the use of] **any** [firearm; explosive; incendiary device; technique capable of causing injury or death to persons]**; and**

(2) **That he did so with the intent to employ such training** [for use in; in furtherance of] **a civil disorder.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 10.400(c)

Unlawful Paramilitary Activity—Brandishing Firearm While Assembled to Intimidate

The defendant is charged with the crime of unlawful paramilitary activity. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [pointed, held, or brandished] a [firearm; air or gas operated weapon; any object similar in appearance]**, in such a manner as to reasonably induce fear in the mind of another of being shot or injured; and**

(2) **That the defendant did so while assembled with one or more persons; and**

(3) **That the defendant did so with the purpose of and intent to intimidate any person or group of persons.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P10.400

Unlawful Paramilitary Activity

You have found the defendant guilty of the crime of unlawful paramilitary activity.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-433.1, 18.2-433.2, 18.2-433.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-433.1 for definitions of the terms "civil disorder," "explosive or incendiary device," "firearm," and "law enforcement officer."

ALERTS:

• The instruction includes two different versions of elements (1) and (2) of the crime, based on the proscriptions set out in Va. Code Ann. § 18.2-433.2(1) and (2).

• Instruction 10.400(a) should be used when the defendant taught or demonstrated to any other person the use, application, or making of any (i) firearm, (ii) explosive, (iii) incendiary device, or (iv) any technique capable of causing injury or death to persons; and did so knowing, or having reason to know, or intending that the training acquired from such teaching or demonstration would be employed for use in, or in furtherance of, a civil disorder, as those terms are defined in Va. Code Ann. § 18.2-433.1.

• Instruction 10.400(b) should be used when the defendant assembled with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any (i) firearm, (ii) explosive, (iii) incendiary device, or (iv) technique capable of causing injury or death to persons; and did so with the intent to employ such training for use in, or in furtherance of, a civil disorder, as those terms are defined in Va. Code Ann. § 18.2-433.1.

• Instruction 10.400(c) addresses brandishing a weapon with the intent to intimidate when more than one person is assembled. Instruction 18.710 covers brandishing a weapon.

• Only the elements fitting the facts of the case should be used.

PRACTICE POINTER:

See Va. Code Ann. § 18.2-433.3 for those acts and activities excepted from the offense.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"; and "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; and Constitutional Law § 78

Instruction No. 10.500

Causing Telephone or Pager to Ring with Intent to Annoy—Emergency

The defendant is charged with the crime of causing a telephone used by emergency services personnel to ring with intent to annoy. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant caused a telephone to ring which was [owned; leased] **for the purpose of receiving emergency calls by a** [public; private] **entity providing** [fire; police; emergency medical] **service; and**

(2) That the defendant did so with intent to annoy, harass, hinder, or delay emergency personnel in the performance of their duties as such.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P10.500

Causing Telephone or Pager to Ring with Intent to Annoy—Emergency

You have found the defendant guilty of the crime of causing a telephone used by emergency services personnel to ring with intent to annoy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-429.

CASE AUTHORITY:

Fountain v. Commonwealth, 64 Va. App. 51, 57, 764 S.E.2d 293, 296 (2014).

PRACTICE COMMENTARY: "An intent to 'annoy, harass, hinder or delay' that arises during the call, i.e., after the 9-1-1 telephone has been caused to ring, does not fall within the scope of the statutory prohibition." *Fountain, 64 Va. App. at 57, 764 S.E.2d at 296.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Communications Offenses"; "Disorderly Conduct and Places"; and "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 19.1[2], 19.2[2], 53.3, 54.1–54.5

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; Constitutional Law § 78; and Telegraph and Telephone Companies § 2

CHAPTER 11

BRIBERY

Scope Note

Instruction No. 11.100 **Offer of Pecuniary Benefit to Public Servant or Party Official**

Instruction No. P11.100 **Offer of Pecuniary Benefit to Public Servant or Party Official**

Instruction No. 11.150 **Offer of Benefit to Public Servant or Party Official: Judicial or Administrative Proceeding**

Instruction No. P11.150 **Offer of Benefit to Public Servant or Party Official: Judicial or Administrative Proceeding**

Instruction No. 11.200 **Acceptance of Pecuniary Benefit by Public Servant or Party Official**

Instruction No. P11.200 **Acceptance of Pecuniary Benefit by Public Servant or Party Official**

Instruction No. 11.250 **Acceptance of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding**

Instruction No. P11.250 **Acceptance of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding**

Instruction No. 11.300 **Solicitation of Pecuniary Benefit by Public Servant or Party Official**

Instruction No. P11.300 **Solicitation of Pecuniary Benefit by Public Servant or Party Official**

Instruction No. 11.350 **Solicitation of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding**

Instruction No. P11.350 **Solicitation of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding**

SCOPE NOTE

Article 3, Chapter 10 of Title 18.2, Bribery of Public Servants and Party Officials, covers offenses analogous to those included in Article 2 of the same chapter. As Article 3 is more comprehensive, the bribery instructions provided are based on that article rather than on Article 2. The model instructions provided can be customized to address any of the bribery offenses covered in Article 2 (giving bribes to, or acceptance of bribes by, public officers or candidates for office; bribes to persons to prevent service of process; giving bribes to, or acceptance of bribes by, court-appointed commissioners, auditors, arbitrators, umpires; giving bribes to, or acceptance of bribes by, jurors (whether impaneled or not); bribery of witnesses, participants in games, contests, or sports; solicitation or acceptance of bribes by participants or prospective participants in games, contests, or sports, or by any manager, coach, or trainer of any team or individual participant or prospective participant in same; corruptly influencing, or being influenced as, agents or employees; and giving or accepting a fee or gift for purposes of influencing the decisions of a financial institution).

Va. Code Ann. § 18.2-447 covers offering, accepting or soliciting a bribe, to or by public servants or party officials. Va. Code Ann. § 18.2-449 makes all such offenses Class 4 felonies. Va. Code Ann. § 18.2-446 provides definitions for several terms used in Va. Code Ann. § 18.2-447.

Va. Code Ann. § 18.2-448 provides that a person's inability or lack of authority to act in the manner desired because he had not yet assumed office or lacked jurisdiction, or for any other reason, is no defense to a bribery charge. Neither is it a defense that a resident of the state charged with bribery was temporarily absent from the state at the time the act was committed.

Va. Code Ann. § 18.2-450 is an immunity section applicable to witnesses for the prosecution, identical to Va. Code Ann. § 18.2-445.

Va. Code Ann. § 18.2-474.2 provides that any person who receives any pecuniary consideration or other benefit to act in violation of Va. Code § 18.2-474 (delivery of articles to prisoners) or Va. Code Ann. § 18.2-474.1 (delivery of drugs to prisoners) is guilty of bribery, punishable as a Class 4 felony. Instruction Nos. 42.300 and 42.301 may be useful in drafting customized instructions for bribery under Va. Code Ann. § 18.2-474.2.

Instruction No. 11.100

Offer of Pecuniary Benefit to Public Servant or Party Official

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [offered to; conferred upon; agreed to confer upon] (name of recipient) **a pecuniary benefit; and**

(2) **That the pecuniary benefit was** [consideration for; to obtain; to influence] **the** [decision; opinion; recommendation; vote; exercise of official discretion] **of** (name of recipient) **as a** [public servant; party official].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P11.100

Offer of Pecuniary Benefit to Public Servant or Party Official

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-447(1)(a), 18.2-449.

CASE AUTHORITY:

Mendez v. Commonwealth, 220 Va. 97, 100–01, 255 S.E.2d 533, 534–35 (1979); *Livingston v. Commonwealth, 184 Va. 830, 840, 36 S.E.2d 561, 566 (1946)* (decided under Va. Code of 1936 § 4496, a predecessor bribery statute); *Ford v. Commonwealth, 177 Va. 889, 893–95, 15 S.E.2d 50, 52–53 (1941)* (decided under Va. Code of 1936 § 4496, a predecessor bribery statute); *Haynes v. Commonwealth, 104 Va. 854, 855–57, 52 S.E. 358, 358–59 (1905)* (decided under Va. Code of 1904 § 3744, a predecessor bribery statute).

PRACTICE COMMENTARY:

Definitions. Va. Code Ann. § 18.2-447 defines as bribery the offer, the acceptance or the solicitation of a bribe. The comprehensive and inclusive language of the statute negates any contention that the offer or promise of a bribe to be given in the future with the intention of influencing future conduct of a public official does not constitute a crime under Va. Code Ann. § 18.2-447. "The gist of the offense is the criminal intent to undermine the proper and orderly administration of justice. The crime is committed by the making of the corrupt offer." *Ford, 177 Va. at 893, 15 S.E.2d at 52–53.*

See Va. Code Ann. § 18.2-446 for definitions of "benefits," "party official," "pecuniary benefit," "public servant," and "administrative proceeding" as used in Va. Code Ann. § 18.2-447.

Specific Sum Not Required in Indictment. It is not necessary that a specific sum of money be mentioned to be convicted of bribery under Va. Code Ann. § 18.2-447. It is a violation of the statute if a bribe is given, a bribe is offered, or a bribe is promised. *Mendez, 220 Va. at 99–100, 255 S.E.2d at 534.*

Similarity of Statutes. Although Va. Code Ann. § 18.2-447 (bribery of a public servant or party official) is not identical to Va. Code Ann. § 18.2-438 (bribery of a public officer or a candidate for public office), in many cases the same act would violate either or both statutes.

☞ ***PRACTICE POINTER:***

The indictment need not state that the accused knew the official character of the person to whom the bribe was offered since the indictment necessarily implies such knowledge. *Livingston, 184 Va. at 839–40, 36 S.E.2d at 566.*

ALERTS:

• Va. Code Ann. § 18.2-448 provides that it is no defense that the person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason; nor is it a defense that a resident of this state charged with bribery was temporarily absent from the state when the act was committed.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; and Public Officers § 51

Instruction No. 11.150

Offer of Benefit to Public Servant or Party Official: Judicial or Administrative Proceeding

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [offered to; conferred upon; agreed to confer upon] (name of recipient) **a benefit; and**

(2) **That the benefit was** [consideration for; to obtain; to influence] **the** [decision; opinion; recommendation; vote; exercise of official discretion] **of** (name of recipient) **in** [a judicial; an administrative] **proceeding.**

[(2) That the benefit was consideration for the violation by (name of recipient) of a known legal duty as a [public servant; party official].]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Note:

The instruction includes two different versions of Element (2). Only the one fitting the facts of the case should be used.

Instruction No. P11.150

Offer of Benefit to Public Servant or Party Official: Judicial or Administrative Proceeding

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-447(1)(b), 18.2-449.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-446 for the definitions of "benefits," "public servant," "party official," and "administrative proceeding" as used in Va. Code Ann. § 18.2-447.

See also Practice Commentary to Instruction Nos. 11.100 and P11.100.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW & PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; and Public Officers § 51

Instruction No. 11.200

Acceptance of Pecuniary Benefit by Public Servant or Party Official

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [accepted; agreed to accept] **from another a pecuniary benefit; and**

(2) **That the pecuniary benefit was** [offered; conferred; agreed to be conferred] [as consideration for; to obtain; to influence] **the defendant's** [decision; opinion; recommendation; vote; exercise of discretion] **as a** [public servant; party official].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P11.200

Acceptance of Pecuniary Benefit by Public Servant or Party Official

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-447(2)(a), 18.2-449.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-446 for the definitions of "pecuniary benefit," "public servant," and "party official" as used in Va. Code Ann. § 18.2-447.

See also Practice Commentary to Instruction Nos. 11.100 & P11.100.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; Public Officers § 51

Instruction No. 11.250

Acceptance of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [accepted; agreed to accept] **from another a benefit; and**

(2) **That the benefit was** [offered; conferred; agreed to be conferred] [as consideration for; to obtain; to influence] **the defendant's** [decision; opinion; recommendation; vote; exercise of official discretion] **in** [a judicial; an administrative] **proceeding**.

[(2) That the benefit was [offered; conferred; agreed to be conferred] [as consideration for; to obtain; to influence] the defendant's violation of a known legal duty as a [public servant; party official].]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Note:

The instruction includes two different versions of Element (2). Only the one fitting the facts of the case should be used.

Instruction No. P11.250

Acceptance of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-447(2)(b).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-446 for the definitions of "benefit," "public servant," "administrative proceeding," and "party official" as used in Va. Code Ann. § 18.2-447.

See also Practice Commentary to Instruction Nos. 11.100 & P11.100.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; and Public Officers § 51

Instruction No. 11.300

Solicitation of Pecuniary Benefit by Public Servant or Party Official

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant solicited from another** [a pecuniary benefit; a promise of pecuniary benefit]; **and**

(2) **That the** [pecuniary benefit; promise of pecuniary benefit] **was** [consideration for; in exchange for] **the defendant's** [decision; opinion; recommendation; vote; exercise of discretion] **as a** [public servant; party official].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P11.300

Solicitation of Pecuniary Benefit by Public Servant or Party Official

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-447(3)(a), 18.2-449.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-446 for the definitions of "pecuniary benefit," "public servant," and "party official" as used in Va. Code Ann. § 18.2-447.

See also Practice Commentary to Instruction Nos. 11.100 & P11.100.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; and Public Officers § 51

Instruction No. 11.350

Solicitation of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding

The defendant is charged with the crime of bribery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant solicited from another** [a benefit; a promise of benefit]; **and**

(2) **That the** [benefit; promise of benefit] **was** [as consideration for; in exchange for] **the defendant's** [decision; opinion; recommendation; vote; exercise of discretion] **in** [a judicial; an administrative] **proceeding**.

[(2) That the [benefit; promise of benefit] was [as consideration for; in exchange for] the defendant's violation of a known legal duty as a [public servant; party official].]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Note:

The instruction includes two different versions of Element (2). Only the one fitting the facts of the case should be used.

Note:

The instruction includes two different versions of Element (2). Only the one fitting the facts of the case should be used.

Instruction No. P11.350

Solicitation of Benefit by Public Servant or Party Official: Judicial or Administrative Proceeding

You have found the defendant guilty of the crime of bribery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-447(3)(b), 18.2-449.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-446 for the definitions of "benefit," "public servant," "administrative proceeding," and "party official" as used in Va. Code Ann. § 18.2-447.

See also Practice Commentary to Instruction Nos. 11.100 & P11.100.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Bribery" and "Conflict of Interests"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 24.1–24.4, 28.2

MICHIE'S JURISPRUDENCE, Bribery §§ 1–6; Obstructing Justice § 4; and Public Officers § 51

CHAPTER 12

BURGLARY AND RELATED OFFENSES

Scope Note

Instruction No. 12.100 Common Law Burglary—Unarmed

Instruction No. P12.100 Common Law Burglary—Unarmed

Instruction No. 12.150 Common Law Burglary—Armed

Instruction No. P12.150(a) Common Law Burglary—Armed

Instruction No. P12.150(b) Common Law Burglary

Instruction No. 12.200 Statutory Burglary—With Intent to Commit Murder, Rape, Robbery, or Arson

Instruction No. P12.200 Statutory Burglary—With Intent to Commit Murder, Rape, Robbery, or Arson

Instruction No. 12.220 Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson

Instruction No. P12.220 Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson

Instruction No. 12.230 Statutory Burglary—With Intent to Commit Assault and Battery

Instruction No. P12.230 Statutory Burglary—With Intent to Commit Assault and Battery

Instruction No. 12.240 Statutory Burglary—Breaking and Entering Dwelling House With Intent to Commit Misdemeanor Other Than Trespass or Assault and Battery

Instruction No. P12.240 Statutory Burglary—Breaking and Entering Dwelling House With Intent to Commit Misdemeanor Other Than Trespass or Assault and Battery

Instruction No. 12.300 Entering Bank While Armed With a Deadly Weapon With Intent to Commit Larceny

Instruction No. P12.300 Entering Bank While Armed With a Deadly Weapon With Intent to Commit Larceny

Instruction No. 12.400 Possession of Burglary Tools

Instruction No. P12.400 Possession of Burglary Tools

Instruction No. 12.500 Burglary—Possession Inference

Instruction No. 12.510 Inference of Criminal Intent

Instruction No. 12.600 Breaking—Definition

Instruction No. 12.610 Entering—Definition

Instruction No. 12.620 Dwelling House—Definition

Instruction No. 12.630 Implement—Definition

Instruction No. 12.640 Tool—Definition

SCOPE NOTE

The following instructions cover the crimes relating to burglary.

Instruction No. 12.100 deals with the crime of common law burglary as set forth in Va. Code Ann. § 18.2-89. At common law, burglary referred to the breaking and entering at night of a dwelling house of another with intent to commit a felony therein. *Compton v. Commonwealth, 190 Va. 48, 52–53, 55 S.E.2d 446, 448 (1949).* Va. Code Ann. § 18.2-89, however, has extended the crime of common law burglary to include the breaking and entering at night of a dwelling house of another with intent to commit a felony *or any larceny* therein. The various forms of statutory burglary proscribed by Va. Code Ann. §§ 18.2-90, 18.2-91, and 18.2-92 are covered in Instructions No. 12.200 to 12.240.

Instruction No. 12.150, like Instruction No. 12.100, is based on Va. Code Ann. § 18.2-89. It outlines the elements of armed common law burglary and reflects the increased penalty which may be imposed where the defendant is convicted of commission of the principal crime while armed with a deadly weapon. This instruction indicates the way in which Instructions No. 12.200, 12.220, and 12.240 may be altered to accommodate cases in which the defendant is charged with having committed statutory burglary while armed with a deadly weapon.

Instruction No. 12.200 deals with statutory burglary as defined by Va. Code Ann. § 18.2-90, where there is an intent to commit murder, rape, robbery, or arson.

Instruction No. 12.220 covers statutory burglary as defined in Va. Code Ann. § 18.2-91, where there is an intent to commit larceny or any felony not enumerated in Va. Code Ann. § 18.2-91.

Instruction No. 12.230 covers statutory burglary as defined in Va. Code Ann. § 18.2-91, where there is an intent to commit assault and battery.

Instruction No. 12.240 relates to the crime of statutory burglary set forth in Va. Code Ann. § 18.2-92, consisting of the breaking and entering of an occupied dwelling house with intent to commit any misdemeanor other than assault and battery or trespass. Commission of this offense is punishable as a Class 6 felony. However, if the person was armed with a deadly weapon at the time of such entry, she shall be guilty of a Class 2 felony. Breaking and entering with intent to commit assault and battery is punishable as statutory burglary under Va. Code Ann. § 18.2-91.

Instruction No. 12.300 covers the crime set forth in Va. Code Ann. § 18.2-93, namely, entering a bank, at any time of day, while armed with intent to commit larceny of money, bonds, notes, or other evidence of debt therein.

Instruction No. 12.400 relates to the offense of possession of burglary tools with intent to commit burglary, robbery or larceny as established by Va. Code Ann. § 18.2-94.

Instruction No. 12.500 is derived from case law as to the permissible inference that may be drawn from evidence of exclusive possession of recently stolen goods.

With respect to the permissible inferences of criminal intent and specific criminal intent, see Instruction No. 12.510, Inference of Criminal Intent.

Instructions No. 12.600, 12.610, 12.620, 12.630, and 12.640 provide definitions of "breaking," "entering," "dwelling house," "implement," and "tool," respectively.

Instruction No. 12.100

Common Law Burglary—Unarmed

The defendant is charged with the crime of burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [without permission] **broke and entered the dwelling house of another; and**

(2) That he did so in the nighttime; and

(3) That he did so with the intent to commit [larceny; (name of felony)] **therein.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P12.100

Common Law Burglary—Unarmed

You have found the defendant guilty of the crime of burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-10(c), (g), 18.2-78, 18.2-89.

PRINCIPAL CASE AUTHORITY:

Velasquez v. Commonwealth, 276 Va. 326, 328–30, 661 S.E.2d 454, 455–57 (2008); *Wright v. Commonwealth, 49 Va. App. 312, 318–21, 641 S.E.2d 119, 122–23 (2007)*; *Tompkins v. Commonwealth, 212 Va. 460, 461–62, 184 S.E.2d 767, 768 (1971)*; *Taylor v. Commonwealth, 207 Va. 326, 332–34, 150 S.E.2d 135, 140–41 (1966)*; *Dixon v. Commonwealth, 197 Va. 380, 382–83, 89 S.E.2d 344, 345–46 (1955)*.

OTHER RELEVANT DECISIONS:

Giles v. Commonwealth, 277 Va. 369, 373–76, 672 S.E.2d 879, 882–84 (2009); *Vincent v. Commonwealth, 276 Va. 648, 652–55, 668 S.E.2d 137, 140–41 (2008)*; *Slaughter v. Commonwealth, 49 Va. App. 659, 666–68, 644 S.E.2d 89, 92–93 (2007)*; *Lassiter v. Commonwealth, 46 Va. App. 604, 612–13, 620 S.E.2d 563, 566–67 (2005)*; *Hitt v. Commonwealth, 43 Va. App. 473, 478–83, 598 S.E.2d 783, 785–88 (2004)*; *Johnson v. Commonwealth, 18 Va. App. 441, 445–48, 444 S.E.2d 559, 561–63 (1994)*; *Snyder v. Commonwealth, 220 Va. 792, 798–99, 263 S.E.2d 55, 58–59 (1980)*; *Patterson v. Commonwealth, 215 Va. 698, 699, 213 S.E.2d 752, 753 (1975)*; *Smyth v. Morrison, 200 Va. 728, 733–34, 107 S.E.2d 430, 434 (1959)*; *Compton v. Commonwealth, 190 Va. 48, 52–55, 55 S.E.2d 446, 448–49 (1949)*.

PRACTICE COMMENTARY: See Instructions No. 12.600, 12.610, and 12.620 for definitions of "breaking," "entering," and "dwelling house," respectively.

Dwelling. Burglary is an offense against the dwelling house of another, against the security of one's habitation. *Giles, 277 Va. at 374, 672 S.E.2d at 882*. Thus, a deserted house cannot be burglarized, nor can a house not then intended to be occupied, even though fully furnished. *See Rash v. Commonwealth, 9 Va. App. 22, 26–27, 383 S.E.2d 749, 751–52 (1989)*. However, Va. Code Ann. § 18.2-89 is applicable to dwelling houses whose occupants are temporarily absent, regardless of whether that absence occurs at regular or irregular intervals. *Giles*, 277 Va. at 375, 672 S.E.2d at 883; *Johnson, 18 Va. App. at 446–48, 444 S.E.2d at 562–63; Rash, 9 Va. App. at 26–27, 383 S.E.2d at 751–52*.

Va. Code Ann. § 18.2-78 restricts what buildings constitute parts of a "dwelling house."

A structure that does not qualify as a dwelling house may be the object of "statutory burglary" as defined in Va. Code Ann. §§ 18.2-90 and 18.2-91. These provisions are covered by Instructions No. 12.200 and 12.220.

Nighttime. To sustain a conviction of common law burglary under Va. Code Ann. § 18.2-89, the breaking and entering must occur in the nighttime. "Night" is defined as the "time from sunset to sunrise." *Wright, 49 Va. App. at 318–19, 641 S.E.2d at 122* (quoting BLACK'S LAW DICTIONARY 1071 (8th ed. 2004)). In *Ryan*

v. Commonwealth, the Court said that it was not reversible error for the trial court to admit evidence of the time and tide chart of a newspaper on the day following the crime in order to show the time of sunrise. *219 Va. 439, 445–46, 247 S.E.2d 698, 703 (1978).*

Intent to commit larceny or a felony. Proof of intent to commit larceny or a felony is as essential for conviction as proof of breaking and entering of the dwelling in the nighttime. *Vincent, 276 Va. at 652, 668 S.E.2d at 140*; *Dixon, 197 Va. at 382, 89 S.E.2d at 345*. Specific intent is an essential element of burglary. *Taylor, 207 Va. at 332, 150 S.E.2d at 140*. Intent may be proven by circumstantial evidence and is often done so because of the difficulty in obtaining direct proof. *Vincent, 276 Va. at 652, 668 S.E.2d at 140; Slaughter, 49 Va. App. at 667, 644 S.E.2d at 92*. Nonetheless, the existence of intent cannot be based upon surmise or speculation. *Patterson, 215 Va. at 699, 213 S.E.2d at 753;* see also *Taylor, 207 Va. at 333–34, 150 S.E.2d at 141*.

Voluntary intoxication not a defense. Regarding the rejection of a theory of voluntary intoxication as a defense, see *Chittum v. Commonwealth, 211 Va. 12, 18, 174 S.E.2d 779, 783 (1970)* (holding that "[v]oluntary drunkenness, where it has not produced permanent insanity, is [n]ever an excuse for crime; [e]xcept, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree") and *Brenan v. Commonwealth, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945)* (an instruction setting up the defendant's voluntary intoxication as a defense to a robbery charge was properly rejected on the ground that, "[e]ven if there had been evidence of drunkenness, under the decisions of this [C]ourt, it would have been no excuse for the crime"). See also the Sources & Authority statement for Instruction No. 53.200.

Absence of permission inference. The jury can reasonably infer from the method of a defendant's entry that the defendant did not have the owners or tenants' permission to enter the premises even though all owners and tenants did not testify. *Slaughter, 49 Va. App. at 666, 644 S.E.2d at 92*. Permission to enter may be negated, however, for purposes of establishing burglary or statutory burglary if the defendant's previously formed intent to commit a crime exceeds the scope of the permission to enter. *Jones v. Commonwealth, 279 Va. 295, 300, 687 S.E.2d 738, 741 (2010)*; *Davis v. Commonwealth, 132 Va. 521, 524, 110 S.E. 356, 357 (1922).*

Lesser included offense. Statutory burglary under Va. Code Ann. § 18.2-91 is a lesser included offense of common law burglary under Va. Code Ann. § 18.2-89. *Wright, 49 Va. App. at 320, 641 S.E.2d at 123*. Va. Code Ann. § 18.2-92 is a lesser included offense of Va. Code Ann. § 18.2-89, the principal distinction being that under Va. Code Ann. § 18.2-92 the intended crime is a non-theft misdemeanor rather than a felony. *Johnson, 18 Va. App. at 445–46, 444 S.E.2d at 562*.

Although *Lowe v. Commonwealth, 33 Va. App. 583, 535 S.E.2d 689 (2000),* is not directly on point, common law trespassing and statutory trespassing are not lesser included offenses of common law burglary.

Self-defense does not justify a burglary. In *Graham v. Commonwealth*, the Court of Appeals explained that "[t]he right to use force to defend against death or serious bodily harm cannot excuse or justify a burglary or larceny." *31 Va. App. 662, 672–73, 525 S.E.2d 567, 572 (2000).*

See also the Sources & Authority statement for Instruction No. 12.220.

ALERTS:

• Where there is evidence of permission to enter, the defendant is entitled to an instruction that the jury must find that the entry was contrary to the will of the occupant. *Snyder, 220 Va. at 798–99, 263 S.E.2d at 59.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.150

Common Law Burglary—Armed

The defendant is charged with the crime of burglary while armed. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [without permission] **broke and entered the dwelling house of another; and**

(2) That he did so in the nighttime; and

(3) That he did so with the intent to commit [larceny; (name of felony)] **therein; and**

(4) That at the time of his entry he was armed with a deadly weapon.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the elements of the crime, then you shall find the defendant guilty of burglary while armed, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged but you also find that the defendant was not armed with a deadly weapon at the time of entry, then you shall find the defendant guilty of burglary, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the other elements of the crime, then you shall find the defendant not guilty.

(3) That the defendant [without permission] broke and entered the dwelling house of another, and

(4) That at the time of his entry he was armed with a deadly weapon.

Instruction No. P12.150(a)

Common Law Burglary—Armed

You have found the defendant guilty of the crime of burglary while armed.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than twenty (20) years; or

(2) Imprisonment for life or for a specific term, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P12.150(b)

Common Law Burglary

You have found the defendant guilty of the crime of burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-10(b), (c), (g), 18.2-78, 18.2-89.

CASE AUTHORITY:

Lee v. Commonwealth, 68 Va. App. 313, 318–20, 808 S.E.2d 224, 227–28 (2017); *Inge v. Commonwealth, 39 Va. App. 85, 87–88, 570 S.E.2d 869, 870–71 (2002)*; *Pritchett v. Commonwealth, 219 Va. 927, 929, 252 S.E.2d 352, 353–54 (1979)*.

PRACTICE COMMENTARY: See the Sources & Authority statement for Instruction No. 12.100.

A defendant can employ an item as both a burglarious tool and a weapon. See *Lee, 68 Va. App. at 320, 808 S.E.2d at 228* (holding that a screwdriver used to break into a dwelling and to threaten the resident inside was both a burglarious tool and a deadly weapon).

A "deadly weapon" is defined as one which is likely to produce death or great bodily injury from the manner in which it is used. *Inge, 39 Va. App. at 87, 570 S.E.2d at 870; Pritchett, 219 Va. at 928–29, 252 S.E.2d at 353*; *Pannill v. Commonwealth, 185 Va. 244, 254, 38 S.E.2d 457, 462 (1946)*. Whether a particular instrument is a "deadly weapon" in a particular circumstance is a question of fact. *Justiss v. Commonwealth, 61 Va. App. 261, 277–79, 734 S.E.2d 699, 707 (2012); Inge, 39 Va. App. at 87, 570 S.E.2d at 870–71*. For a discussion of "deadly weapon" in the armed robbery context, see *Justiss, 61 Va. App. at 277–79, 734 S.E.2d at 707*; *Cox v. Commonwealth, 218 Va. 689, 690–92, 240 S.E.2d 524, 525–26 (1978)*. See also Instruction No. 18.705, Definition of Firearm—Used for Purposes of Intimidation, and Instruction No. 18.850, Deadly Weapon—Definition.

In *Juniper v. Commonwealth*, the Supreme Court of Virginia approved an instruction identical to the model instruction regarding armed statutory burglary and the lesser included offense of unarmed statutory burglary, holding that "[t]he armed burglary instruction properly set forth the legal definition of both armed burglary and the lesser-included offense of burglary." *271 Va. 362, 417–18, 626 S.E.2d 383, 418–19 (2006)*.

ALERTS:

• Where there is evidence of permission to enter, the defendant is entitled to an instruction that the jury must find that the entry was contrary to the will of the occupant. *Snyder v. Commonwealth, 220 Va. 792, 798–99, 263 S.E.2d 55, 59 (1980)*. Permission to enter may be negated, however, for purposes of establishing burglary or statutory burglary if the defendant's previously formed intent to commit a crime exceeds the scope of the permission to enter. *Jones v. Commonwealth, 279 Va. 295, 300, 687 S.E.2d 738, 741 (2010)*; *Davis v. Commonwealth, 132 Va. 521, 524, 110 S.E. 356, 357 (1922)*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.200

Statutory Burglary—With Intent to Commit Murder, Rape, Robbery, or Arson

The defendant is charged with the crime of statutory burglary. The Commonwealth must prove beyond a reasonable doubt both of the following elements of that crime:

(1) That the defendant [without permission]

[(a) in the nighttime entered without breaking];

[(i) a dwelling house or an adjoining, occupied outhouse; in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation]; **OR**

[(b) in the daytime broke and entered;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(c) in the daytime entered and concealed himself in;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(d) at any time [breaks and enters; enters and conceals himself in];

(i) in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation;] **and**

(2) That he did so with the intent to commit [murder; rape; robbery; arson].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Burglary—Will Insert an Amount Murder, Rape, Robbery, or Arson

The defendant is charged with the crime of statutory burglary. The Commonwealth must prove [now] a reasonable doubt both of the following elements of that crime:

(1) That the defendant [without permission]

[(a) in the nighttime entered without breaking];

[(i) a dwelling house or an adjoining, occupied outhouse; in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation; OR

[(b) in the daytime broke and entered;

(i) a dwelling house or an adjoining, occupied outhouse; OR

[(c) in the daytime entered and concealed himself in;

(i) a dwelling house or an adjoining, occupied outhouse; OR

[(d) at any time [breaks and enters; enters and conceals himself in];

(i) in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation; and

(2) That he did so with the intent to commit [murder, rape, robbery, arson].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [as charged in the indictment] and your verdict will be [murder in the first degree] [murder in the second degree] [rape] [robbery] [arson].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P12.200

Statutory Burglary—With Intent to Commit Murder, Rape, Robbery, or Arson

You have found the defendant guilty of the crime of statutory burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

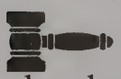
Va. Code Ann. §§ 18.2-10(c), (g), 18.2-78, 18.2-90.

PRINCIPAL CASE AUTHORITY:

Vincent v. Commonwealth, 276 Va. 648, 652–55, 668 S.E.2d 137, 140–41 (2008); Velasquez v. Commonwealth, 276 Va. 326, 328–31, 661 S.E.2d 454, 455–57 (2008); Juniper v. Commonwealth, 271 Va. 362, 417–18, 626 S.E.2d 383, 418–19 (2006); Dalton v. Commonwealth, 14 Va. App. 544, 545–49, 418 S.E.2d 563, 563–66 (1992); Snyder v. Commonwealth, 220 Va. 792, 798–99, 263 S.E.2d 55, 58–59 (1980).

OTHER RELEVANT DECISIONS:

Giles v. Commonwealth, 277 Va. 369, 373–76, 672 S.E.2d 879, 882–84 (2009); Slaughter v. Commonwealth, 49 Va. App. 659, 666–68, 644 S.E.2d 89, 92–93 (2007); Scott v. Commonwealth, 49 Va. App. 68, 74–77, 636 S.E.2d 893, 896–97 (2006); Lassiter v. Commonwealth, 46 Va. App. 604, 612–13, 620 S.E.2d 563, 567 (2005); Hitt v. Commonwealth, 43 Va. App. 473, 478–83, 598 S.E.2d 783, 785–88 (2004); Clark v. Commonwealth, 22 Va. App. 673, 675–78, 472 S.E.2d 663, 664–65 (1996); Griffin v. Commonwealth, 13 Va. App. 409, 411–13, 412 S.E.2d 709, 710–12 (1991); Cruz v. Commonwealth, 12 Va. App. 661, 662–64, 406 S.E.2d 406, 407 (1991); Patterson v. Commonwealth, 215 Va. 698, 699, 213 S.E.2d 752, 753 (1975); Taylor v. Commonwealth, 207 Va. 326, 332–34, 150 S.E.2d 135, 140–41 (1966); Dixon v. Commonwealth, 197 Va. 380, 382–83, 89 S.E.2d 344, 345–46 (1955).



PRACTICE COMMENTARY: ***Intent.*** Both statutory burglary and common-law burglary are specific intent crimes in which the Commonwealth has the burden of proving, as an essential element of the crime, that the defendant committed an unlawful entry with the requisite intent. *Velasquez, 276 Va. at 329, 661 S.E.2d at 456.* Specific intent can be inferred from the facts and circumstances in the case, and the acts and conduct of the defendant. *Id. at 330, 661 S.E.2d at 456. See Instruction No. 12.510, Inference of Criminal Intent.*

Voluntary intoxication not a defense. Regarding the rejection of a theory of voluntary intoxication as a defense, *see Chittum v. Commonwealth, 211 Va. 12, 17–18, 174 S.E.2d 779, 782–83 (1970)* (holding that "[v]oluntary drunkenness, where it has not produced permanent insanity, is [n]ever an excuse for crime; [e]xcept, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree") and *Brenan v. Commonwealth, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945)* (an instruction setting up the defendant's voluntary intoxication as a defense to a robbery charge was properly rejected on the ground that, "[e]ven if there had been evidence of drunkenness, under the decisions of this [C]ourt, it would have been no excuse for the crime"). See also the Sources & Authority statement for Instruction No. 53.200.

On intent to commit rape, *see Snyder, 220 Va. at 798–99, 263 S.E.2d at 58–59*; *Patterson, 215 Va. at 699, 213 S.E.2d at 753*; *Taylor, 207 Va. at 334, 150 S.E.2d at 141*; *Hammer v. Commonwealth, 207 Va. 165, 168–69, 148 S.E.2d 896, 898 (1966)*; and *Dixon, 197 Va. at 382–83, 89 S.E.2d at 345–46.*

Proof and instructions concerning permission to enter the premises. The Commonwealth must prove that the defendant entered the premises without the occupier's permission. *Snyder, 220 Va. at 798–99, 263 S.E.2d at 59.* The jury can reasonably infer from the method of a defendant's entry that the defendant did not have the owners' or tenants' permission to enter the premises even though all owners and tenants did not testify. *Slaughter, 49 Va. App. at 666, 644 S.E.2d at 92.* Permission to enter may be negated for purposes of establishing burglary or statutory burglary if the defendant's previously formed intent to commit a crime exceeds the scope of the permission to enter. *Jones v. Commonwealth, 279 Va. 295, 300, 687 S.E.2d 738, 741 (2010)*; *Davis v. Commonwealth, 132 Va. 521, 524, 110 S.E. 356, 357 (1922).*

Where there is evidence of permission to enter, the defendant is entitled to an instruction that the jury must find that the entry was contrary to the will of the occupant. *Snyder, 220 Va. at 799, 263 S.E.2d at 59.*

ALERTS:

• When armed statutory burglary with intent to commit murder, rape, robbery or arson is charged, this instruction should be altered so that it is similar in style to Instruction No. 12.150 while retaining the elements of the charged offense.

The punishment for armed statutory burglary with intent to commit murder, rape, robbery or arson is a Class 2 felony. If the defendant is found guilty of that offense, the Class 2 punishment provisions from Instruction No. P12.150(a) should be substituted in place of the Class 3 punishment provisions in Instruction No. P12.200.

• Va. Code Ann. §§ 18.2-90 and 18.2-91 describe four distinct offenses: (1) entering without breaking at night; (2) breaking and entering in the daytime; (3) entering and concealing oneself in the daytime; and (4) breaking and entering or entering and concealing oneself at any time in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation. If the indictment specifies one such offense (e.g., entry without breaking in the nighttime), the proof must conform to that offense or, absent timely amendment, the indictment will be dismissed even if there is evidence to support one of the other offenses described under the statute. *Scott, 49 Va. App. at 73–77, 636 S.E.2d at 895–97.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.220

Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson

The defendant is charged with the crime of statutory burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [without permission]

[(a) in the nighttime entered without breaking];

[(i) a dwelling house or an adjoining, occupied outhouse; in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation]; **OR**

[(b) in the daytime broke and entered;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(c) in the daytime entered and concealed himself in;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(d) at any time [breaks and enters; enters and conceals himself in];

(i) in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation;] **and**

(2) That he did so with the intent to commit [larceny; (name of felony other than murder, rape, robbery, or arson)]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P12.220

Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson

You have found the defendant guilty of the crime of statutory burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

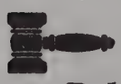
Va. Code Ann. §§ 18.2-78, 18.2-89, 18.2-90, 18.2-91.

PRINCIPAL CASE AUTHORITY:

Vincent v. Commonwealth, 276 Va. 648, 652–55, 668 S.E.2d 137, 140–41 (2008); Velasquez v. Commonwealth, 276 Va. 326, 328–31, 661 S.E.2d 454, 455–57 (2008); Juniper v. Commonwealth, 271 Va. 362, 417–18, 626 S.E.2d 383, 418–19 (2006); Dalton v. Commonwealth, 14 Va. App. 544, 545–49, 418 S.E.2d 563, 563–66 (1992); Snyder v. Commonwealth, 220 Va. 792, 798–99, 263 S.E.2d 55, 58–59 (1980).

OTHER RELEVANT DECISIONS:

Giles v. Commonwealth, 277 Va. 369, 373–76, 672 S.E.2d 879, 882–84 (2009); Finney v. Commonwealth, 277 Va. 83, 88–90, 671 S.E.2d 169, 172–74 (2009); Slaughter v. Commonwealth, 49 Va. App. 659, 666–68, 644 S.E.2d 89, 92–93 (2007); Wright v. Commonwealth, 49 Va. App. 312, 318–21, 641 S.E.2d 119, 122–23 (2007); Lassiter v. Commonwealth, 46 Va. App. 604, 612–13, 620 S.E.2d 563, 567 (2005); Hitt v. Commonwealth, 43 Va. App. 473, 478–83, 598 S.E.2d 783, 785–88 (2004); Breeden v. Commonwealth, 43 Va. App. 169, 181–82, 596 S.E.2d 563, 569 (2004); Clark v. Commonwealth, 22 Va. App. 673, 675–78, 472 S.E.2d 663, 664–65 (1996); Buie v. Commonwealth, 21 Va. App. 526, 529–30, 465 S.E.2d 596, 597–98 (1996); Lea v. Commonwealth, 16 Va. App. 300, 304–06, 429 S.E.2d 477, 480–81 (1993); Crump v. Commonwealth, 13 Va. App. 286, 290–91, 411 S.E.2d 238, 240–41 (1991); Guynn v. Commonwealth, 220 Va. 478, 480, 259 S.E.2d 822, 823–24 (1979); Ridley v. Commonwealth, 219 Va. 834, 836–37, 252 S.E.2d 313, 314–15 (1979); Jones v. Commonwealth, 208 Va. 370, 376–77, 157 S.E.2d 907, 911–12 (1967); Smyth v. Morrison, 200 Va. 728, 733–34, 107 S.E.2d 430, 434 (1959).



PRACTICE COMMENTARY:

Related but distinct burglary statutes. Va. Code Ann. § 18.2-90 classifies statutory burglary where the defendant intended to commit murder, rape, robbery, or arson as a Class 3 felony. Va. Code Ann. § 18.2-91 addresses statutory burglary where the defendant intended to commit larceny, assault and battery, or any felony other than murder, rape, robbery, or arson. Under either statute, the crime is a Class 2 felony if the defendant was armed with a deadly weapon at the time of entry.

Va. Code Ann. §§ 18.2-90 and 18.2-91 address four distinct offenses: (1) entering without breaking at night; (2) breaking and entering in the daytime; (3) entering and concealing oneself in the daytime; and (4) breaking and entering or entering and concealing oneself at any time in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation. If the indictment specifies one such offense (e.g., entry without breaking in the nighttime), the proof must conform to that offense or, absent timely

amendment, the indictment will be dismissed even if there is evidence to support one of the other offenses described under the statute. *Scott v. Commonwealth, 49 Va. App. 68, 73–77, 636 S.E.2d 893, 895–97 (2006).* Breaking and entering need not be concomitant, so long as the intent to commit the substantive crime therein is concurrent with the breaking and the entering. *Bruce v. Commonwealth, 22 Va. App. 264, 267–70, 469 S.E.2d 64, 66–68 (1996).* Furthermore, "[a]lthough breaking is an essential element of common law burglary, the statute's language 'enter[] without breaking' specifically excludes breaking as an element." *Clark, 22 Va. App. at 676, 472 S.E.2d at 664.*

Explaining the similarities and differences between the crime of common law burglary, Va. Code Ann. § 18.2-89, and that of statutory burglary under Va. Code Ann. § 18.2-91, the court in *Smyth* said that the overt acts constituting both crimes, namely the breaking and entering, may be the same. Yet, it is the intent with which the particular crime is committed, the character of the house entered, and the time of the occurrence that determine the nature and degree of the crime. Proof of the intent, of the character of the house entered, and of the time of the breaking and entering or entry without breaking, are matters of evidence. One charged with breaking and entering a dwelling of another in the nighttime, with intent to commit larceny, and the commission of larceny at one and the same time may, depending on the evidence, be acquitted of common law burglary and found guilty of statutory burglary, or larceny, as the proof justifies. *200 Va. at 733–34, 107 S.E.2d at 434.*

Intent. Both statutory burglary and common-law burglary are specific intent crimes in which the Commonwealth has the burden of proving, as an essential element of the crime, that the defendant committed an unlawful entry with the requisite intent. *Velasquez, 276 Va. at 329, 661 S.E.2d at 456.* Specific intent can be inferred from the facts and circumstances in the case, and the acts and conduct of the defendant. *Id. at 330, 661 S.E.2d at 456. See Instruction No. 12.510, Inference of Criminal Intent.*

Voluntary intoxication not a defense. Regarding the rejection of a theory of voluntary intoxication as a defense, *see Chittum v. Commonwealth, 211 Va. 12, 17–18, 174 S.E.2d 779, 782–83 (1970)* (holding that "[v]oluntary drunkenness, where it has not produced permanent insanity, is [n]ever an excuse for crime; [e]xcept, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree") and *Brenan v. Commonwealth, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945)* (an instruction setting up the defendant's voluntary intoxication as a defense to a robbery charge was properly rejected on the ground that, "[e]ven if there had been evidence of drunkenness, under the decisions of this [C]ourt, it would have been no excuse for the crime"). See also the Sources & Authority statement for Instruction No. 53.200.

Proof and instructions concerning permission to enter the premises. The Commonwealth must prove that the defendant entered the premises without the occupier's permission. *Snyder, 220 Va. at 798–99, 263 S.E.2d at 59.* The jury can

reasonably infer from the method of a defendant's entry that the defendant did not have the owner's or tenants' permission to enter the premises even though all owners and tenants did not testify. *Slaughter, 49 Va. App. at 666, 644 S.E.2d at 92.* Permission to enter may be negated for purposes of establishing burglary or statutory burglary if the defendant's previously formed intent to commit a crime exceeds the scope of the permission to enter. *Jones v. Commonwealth, 279 Va. 295, 300, 687 S.E.2d 738, 741 (2010); Davis v. Commonwealth, 132 Va. 521, 524, 110 S.E. 356, 357 (1922).*

Where there is evidence of permission to enter, the defendant is entitled to an instruction that the jury must find that the entry was contrary to the will of the occupant. *Snyder, 220 Va. at 799, 263 S.E.2d at 59.*

Breaking and entering a locked bedroom by a person who has permission to be in a house does not constitute burglary of a dwelling. Burglary requires breaking into a "dwelling." The dwelling will usually be the home as a whole, not individual rooms within the home. *Hitt, 43 Va. App. at 478–83, 598 S.E.2d at 785–88.* A separate apartment within a dwelling, however, can be the subject of a burglary. *Beck v. Commonwealth, 66 Va. App. 259, 267, 784 S.E.2d 310, 314 (2016).*

Burglary and larceny. Where the purpose of the entering is to commit larceny, it is immaterial whether it is grand or petit larceny. *Knight v. Commonwealth, 225 Va. 85, 90, 300 S.E.2d 600, 602 (1983).*

In order to convict a defendant of both burglary with intent to commit larceny and the commission of the larceny, it is necessary to charge him or her in separate counts or in separate indictments. *Jones, 208 Va. at 375–77, 157 S.E.2d at 911–12; Clark v. Commonwealth, 135 Va. 490, 496, 115 S.E. 704, 706 (1923).*

Lesser included offenses. Statutory burglary under Va. Code Ann. § 18.2-91 is a lesser included offense of common law burglary under Va. Code Ann. § 18.2-89. *Wright, 49 Va. App. at 320, 641 S.E.2d at 123.* Va. Code Ann. § 18.2-121 (entering property of another for purpose of damaging it) is not a lesser included offense of Va. Code Ann. § 18.2-91. *Crump, 13 Va. App. at 290–91, 411 S.E.2d at 241.*

In *Lea*, the Court of Appeals held that the defendant was not entitled to an instruction on the lesser included offense of breaking and entering with the intent to commit a misdemeanor. Although the defendant was convicted only of misdemeanor assault and battery of the female victim, the circumstances of the crime indicated that the defendant's intent at the time of breaking into the victim's apartment was to rape the victim. *16 Va. App. at 304–06, 429 S.E.2d at 479–81.*

Common law trespassing is not a lesser included offense of statutory burglary. *Taylor v. Commonwealth, 11 Va. App. 649, 400 S.E2d 794 (1991).* Statutory trespassing, in violation of Va. Code Ann. § 18.2-119, and entering property to damage it, in violation of Va. Code Ann. § 18.2-121, are not lesser included offenses of statutory burglary. *Lowe v. Commonwealth, 33 Va. App. 583, 535 S.E.2d 689 (2000); Crump, 13 Va. App. at 290–91, 411 S.E.2d at 240–41.*

Inference from possession of stolen goods. In *Guynn*, the Supreme Court of

Virginia explained that

> [t]he Commonwealth can establish a prima facie case that a defendant broke and entered by (1) proving that goods have been stolen from a house into which someone has broken and entered; (2) justifying the inference that both offenses were committed at the same time, by the same person, as a part of the same criminal enterprise; and (3) proving that these goods were found soon thereafter in the possession of the defendant.

220 Va. at 480, 259 S.E.2d at 823–24. See also Schaum v. Commonwealth, 215 Va. 498, 501, 211 S.E.2d 73, 76 (1975); Brown v. Commonwealth, 213 Va. 748, 750, 195 S.E.2d 703, 705 (1973).

Instruction 12.620 defines the term "dwelling house." Cases interpreting that definition are included in that instruction's Practice Commentary.

ALERTS:

• When armed statutory burglary under this statute is charged, this instruction should be altered so that it is similar in style to Instruction No. 12.150 while retaining the elements of the charged offense.

The punishment for this version of armed statutory burglary is a Class 2 felony. If the defendant is found guilty of that offense, the Class 2 punishment provisions of Instruction No. P12.150(a) should be substituted in place of the punishment provisions in Instruction No. P12.220.

For a case charging statutory burglary while armed with a deadly weapon, *see Pritchett v. Commonwealth, 219 Va. 927, 928–29, 252 S.E.2d 352, 353–54 (1979).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.230

Statutory Burglary—With Intent to Commit Assault and Battery

The defendant is charged with the crime of statutory burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [without permission]

[(a) in the nighttime broke and entered the dwelling house of another]; **OR**

[(b) in the nighttime entered without breaking];

[(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(ii) in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation]; **OR**

[(c) in the daytime broke and entered;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(d) in the daytime entered and concealed himself in;

(i) a dwelling house or an adjoining, occupied outhouse]; **OR**

[(e) at any time [breaks and enters; enters and conceals himself in];

(i) in any building permanently affixed to realty, or any ship, vessel or rivercraft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation;] **and**

(2) That he did so with the intent to commit assault and battery.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

that crime:

Instruction No. P12.230

Statutory Burglary—With Intent to Commit Assault and Battery

You have found the defendant guilty of the crime of statutory burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

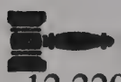
(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY



PRACTICE COMMENTARY: See Sources and Authority Instructions No. 12.220 and P12.220, Statutory Burglary—With Intent to Commit Larceny or Felony Other Than Murder, Rape, Robbery, or Arson.

Instruction No. 12.240

Statutory Burglary—Breaking and Entering Dwelling House With Intent to Commit Misdemeanor Other Than Trespass or Assault and Battery

The defendant is charged with the crime of statutory burglary. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [without permission] **broke and entered a dwelling house while it was occupied; and**

(2) **That he did so with intent to commit** (name of misdemeanor other than trespass or assault and battery)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P12.240

Statutory Burglary—Breaking and Entering Dwelling House With Intent to Commit Misdemeanor Other Than Trespass or Assault and Battery

You have found the defendant guilty of the crime of statutory burglary.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-10(f), 18.2-78, 18.2-92.

CASE AUTHORITY:

Giles v. Commonwealth, 277 Va. 369, 373–76, 672 S.E.2d 879, 882–84 (2009); Lassiter v. Commonwealth, 46 Va. App. 604, 612–13, 620 S.E.2d 563, 567 (2005); Hitt v. Commonwealth, 43 Va. App. 473, 478–83, 598 S.E.2d 783, 785–88 (2004); Johnson v. Commonwealth, 18 Va. App. 441, 446–48, 444 S.E.2d 559, 562–63 (1994).

PRACTICE COMMENTARY: See the Sources & Authority to Instructions No. 12.100, 12.150, 12.200, and 12.220.

In *Johnson* the court stated:

> [W]e hold that the phrase "while said dwelling is occupied" in Va. Code Ann. § 18.2-92 is not an element of the crime requiring the physical presence of the occupant at the time of the unlawful entry. Rather, it is language intended by the legislature to emphasize the character of the use of the dwelling as a place of current habitation rather than a dwelling that is temporarily vacant.

18 Va. App. at 447, 444 S.E.2d at 562.

Breaking and entering a locked bedroom by a person who has permission to be in a house does not constitute burglary of a dwelling house. Burglary requires breaking into a "dwelling." The dwelling will usually be the home as a whole, not individual rooms within the home. *Hitt, 43 Va. App. at 478–83, 598 S.E.2d at 785–88.* A separate apartment within a dwelling, however, can be the subject of a burglary. *Beck v. Commonwealth, 66 Va. App. 259, 267, 784 S.E.2d 310, 314 (2016).*

Permission to enter may be negated for purposes of establishing burglary or statutory burglary if the defendant's previously formed intent to commit a crime exceeds the scope of the permission to enter. *Jones v. Commonwealth, 279 Va. 295, 300, 687 S.E.2d 738, 741 (2010)*; *Davis v. Commonwealth, 132 Va. 521, 524, 110 S.E. 356, 357 (1922).*

Marable v. Commonwealth discusses the meaning of "occupied" in the context of arson. *27 Va. App. 505, 511–13, 500 S.E.2d 233, 236–37 (1998).*

ALERTS:

• When the defendant is charged with this type of burglary while armed, this instruction should be altered so that it is similar in style to Instruction No. 12.150 while retaining the elements of the charged offense.

The punishment for this version of armed statutory burglary is a Class 2 felony. If the defendant is found guilty of that offense, the Class 2 punishment provisions of Instruction No. P12.150(a) should be substituted in place of the punishment provisions in Instruction No. P12.240.

• Breaking and entering with intent to commit assault and battery is punishable under Va. Code Ann. § 18.2-91. See Instruction No. 12.220, Statutory Burglary—Breaking and Entering With Intent to Commit Larceny, Assault and Battery, or Felony Other Than Murder, Rape, Robbery, or Arson.

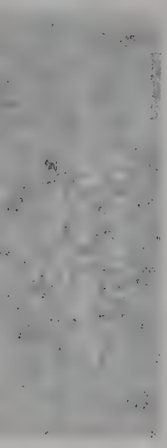
• Where there is evidence of permission to enter, the defendant is entitled to an instruction that the jury must find that the entry was contrary to the will of the occupant. *Snyder v. Commonwealth, 220 Va. 792, 799, 263 S.E.2d 55, 59 (1980).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21



Instruction No. 12.300

Entering Bank While Armed With a Deadly Weapon With Intent to Commit Larceny

The defendant is charged with the crime of entering a bank while armed with a deadly weapon with the intent to commit larceny. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant entered a [bank; savings and loan association; credit union] **while armed with a deadly weapon; and**

(2) That he did so with intent to steal money, bonds, notes or other evidence of debt.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

(2) That he did so with intent to steal money, bonds, notes or other evidences of debt.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment at less than confinement in the penitentiary for one year] and fix his punishment at confinement in the penitentiary for such term as you may deem proper, not less than one year nor more than twenty years, and shall further find that the defendant has been convicted of a felony other than that charged in this indictment and fix his punishment at confinement in the penitentiary for such term as you may deem proper, not less than five years nor more than twenty years.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment at less than confinement in the penitentiary for one year] and fix his punishment at confinement in the penitentiary for such term as you may deem proper, not less than one year nor more than twenty years, and shall further find that a former conviction of a felony has been returned and [whether evidence has been heard in writing]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty.

Instruction No. P12.300

Entering Bank While Armed With a Deadly Weapon With Intent to Commit Larceny

You have found the defendant guilty of the crime of entering a bank while armed with the intent to commit larceny.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than twenty (20) years; or

(2) Imprisonment for life or for a specific term, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-10(b), (g), 18.2-93.

CASE AUTHORITY:

Justiss v. Commonwealth, 61 Va. App. 261, 277–79, 734 S.E.2d 699, 707 (2012); *McCray v. Commonwealth, 37 Va. App. 202, 204–07, 556 S.E.2d 50, 51–52 (2001)*; *Black v. Commonwealth, 20 Va. App. 186, 189–92, 455 S.E.2d 755, 756–58 (1995)*; *Hill v. Commonwealth, 2 Va. App. 683, 706, 347 S.E.2d 913, 926 (1986)*; *Cox v. Commonwealth, 218 Va. 689, 690–92, 240 S.E.2d 524, 525–26 (1978).*

PRACTICE COMMENTARY: See Instruction No. 18.850, Deadly Weapon—Definition. Whether an instrument constitutes a deadly weapon is an ultimate issue within the exclusive province of the jury; accordingly, the Commonwealth is prohibited from eliciting an opinion regarding the deadly character of a weapon. *Justiss, 61 Va. App. at 274–75, 734 S.E.2d at 705–06*. In *Cox*, the Court discusses the definition of "deadly weapon" under Va. Code Ann. § 18.2-93. *218 Va. at 691–92, 240 S.E.2d at 525–26*.

A savings and loan institution is a "banking house" within the meaning of Va. Code Ann. § 18.2-93. *Black, 20 Va. App. at 191–92, 455 S.E.2d at 757–58*. A credit union is a banking house within the meaning of Va. Code Ann. § 18.2-93. *McCray, 37 Va. App. at 206–07, 556 S.E.2d at 52*.

In *Black*, the Court of Appeals approved an instruction featuring language identical to that appearing in the model instruction, explaining that the instruction "stated the law clearly" and "paralleled the language of [Va. Code Ann. § 18.2-93]." *20 Va. App. at 191–92, 455 S.E.2d at 758*.

Convictions for both robbery and entering a banking house while armed do not violate the protections against Double Jeopardy. *Hill, 2 Va. App. at 705–06, 347 S.E.2d at 925–26*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.400

Possession of Burglary Tools

The defendant is charged with the crime of possession of burglary [tools; implements; outfit] **with intent to commit** [burglary; robbery; larceny]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant had in his possession any [tools; implements; outfit] **which might be used for purposes of** [burglary; robbery; larceny]**; and**

(2) That he intended to use [these tools; these implements; this outfit] **to commit** [burglary; robbery; larceny]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P12.400

Possession of Burglary Tools

You have found the defendant guilty of the crime of possession of burglary [tools; implements; outfit] **with intent to commit** [burglary; robbery; larceny]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-10(e), 18.2-94.

CASE AUTHORITY:

Edwards v. Commonwealth, 53 Va. App. 402, 405–12, 672 S.E.2d 894, 895–99 (2009); Williams v. Commonwealth, 50 Va. App. 337, 345, 649 S.E.2d 717, 721 (2007); Hagy v. Commonwealth, 35 Va. App. 152, 157–62, 543 S.E.2d 614, 616–18 (2001); Mercer v. Commonwealth, 29 Va. App. 380, 383–86, 512 S.E.2d 173, 174–76 (1999); Moss v. Commonwealth, 29 Va. App. 1, 3–5, 509 S.E.2d 510, 511–12 (1999); Watkins v. Commonwealth, 26 Va. App. 335, 348–49, 494 S.E.2d 859, 865–66 (1998); Carter v. Commonwealth, 223 Va. 528, 530–33, 290 S.E.2d 865, 865–67 (1982); Nance v. Commonwealth, 203 Va. 428, 432, 124 S.E.2d 900, 903–04 (1962); Burnette v. Commonwealth, 194 Va. 785, 790–93, 75 S.E.2d 482, 485–87 (1953); Smith v. Commonwealth, 190 Va. 10, 15–17, 55 S.E.2d 427, 429–30 (1949).

PRACTICE COMMENTARY: Evidence that burglary, larceny, or robbery has been committed or attempted is not necessary to support a conviction for possession of burglary tools. *Nance, 203 Va. at 432, 124 S.E.2d at 903–04.*

Meaning of "Tools, Implements, or Outfit." It is not necessary that the tools or implements be uniquely designed for an unlawful use. If they are suitable and appropriate for the purpose of breaking and entering burglariously, it is immaterial that they were originally constructed and adapted for lawful uses. *Smith, 190 Va. at 16–17, 55 S.E.2d at 429–30.* The term "implements" in Va. Code Ann. § 18.2-94 means items associated with devices, instruments, equipment, or machinery as they relate to an occupation or profession, but which are used to facilitate the commission of a burglary, robbery, or larceny. An ordinary plastic bag is not an implement under § 18.2-94. *Williams, 50 Va. App. at 345, 649 S.E.2d at 721.* Definitions for the terms "implement" and "tool" are found at Instructions No. 12.630 and 12.640, respectively.

In *Edwards*, both plurality opinions of a divided Court of Appeals sitting en banc rejected an expansive reading of its decision in *Mercer, 29 Va. App. at 383–86, 512 S.E.2d at 174–76.* The Court held that possession of an ordinary, empty purse, even when coupled with an intention to use the purse in a manner facilitating theft, did not transform the purse into a burglarious "tool" or "implement" within the meaning of Va. Code Ann. § 18.2-94. *53 Va. App. at 410–12, 416, 672 S.E.2d at 897–98, 900.*

ALERTS:

• Va. Code Ann. § 18.2-94 contains a provision making possession of burglary tools, implements, or outfits by any person other than a licensed dealer prima facie evidence of intent to commit robbery, burglary, or larceny. The statutory presumption, however, does not attach to all "tools, implements, or outfit[s]" embraced by the statute, but only to those objects which are innately burglarious in character.

Objects which are innately burglarious in character are those commonly used by burglars in house breaking and safe cracking, particularly suitable and appropriate to accomplish the destruction of any ordinary hinderance of access to any building, vault, or safe. *Hagy, 35 Va. App. at 158, 543 S.E.2d at 616.* Thus, in order to sustain a conviction where the objects in issue are not inherently burglarious, the Commonwealth must establish the requisite intent without the benefit of the statutory presumption. *Moss, 29 Va. App. at 3–4, 509 S.E.2d at 511.*

• A reference to the prima facie language from the statute is not included in the instruction in light of cases such as *Sandstrom v. Montana, 442 U.S. 510 (1979)*, and *Francis v. Franklin, 471 U.S. 307 (1985)*, which invalidated mandatory presumptions and presumptions that shift the burden of persuasion from the prosecution to the defendant because such presumptions may be construed to relieve the prosecution of its burden to prove every element of a criminal offense beyond a reasonable doubt. In addition, caution should be exercised when reviewing pre-*Sandstrom* cases to insure their continuing validity. But see *Hagy, 35 Va. App. at 157–58* (applying the statutory presumption after *Sandstrom* and *Francis* and noting that "[a]ll the statute does is to create a presumption of a criminal intent from proof of possession of burglarious tools or implements. Such a presumption is not conclusive; it cuts off no defense. It interposes no obstacle to a contest of all of the issues of fact, and relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence. 'It is merely a rule of evidence and not the determination of a fact.' When possession is proven, the burden of going forward with the evidence shifts to the defendant, but this does not shift the burden of ultimate proof. . . .").

• For a more detailed discussion of burden-shifting presumptions and permissible inferences generally, see the Practice Commentary to Instruction No. 2.600, Inference of Intention.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 6.1, 14–18

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-10, 4-11[b], 4-15[c][2]

Instruction No. 12.500

Burglary—Possession Inference

If you believe from the evidence that [a dwelling house; an adjoining, occupied outhouse; an office; a shop; a manufactured home; a storehouse; a warehouse; a banking house; a house; a ship; a vessel; a river craft; a railroad car; an automobile used as a dwelling; a truck used as a dwelling; a trailer used as a dwelling; a building permanently affixed to realty] **has been broken into and goods stolen therefrom and that the breaking and entering and theft of the goods were committed at the same time, by the same person or persons, then proof of exclusive possession by the defendant of recently stolen goods is a circumstance from which you may reasonably infer that the defendant was the burglar unless, from all the evidence, you have a reasonable doubt as to whether the defendant was the burglar.**

You may not find from the possession of recently stolen goods alone that the defendant is guilty of [burglary; statutory burglary].

The term "recently" is a relative term. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from the defendant's possession of the goods stolen.

"Exclusive possession" must be actual knowing possession.

["Exclusive possession" may be joint with another or others but it must be under circumstances which cause you to believe that the defendant has knowing joint possession. It is not shown when the property is found on premises owned or occupied by others as well as the defendant, or in a place where others had equal opportunity or right of access, unless there is a further showing of actual knowing possession.]

Note:

If there is no issue of joint possession the bracketed paragraph should not be given.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Finney v. Commonwealth, 277 Va. 83, 90, 671 S.E.2d 169, 173–74 (2009); Ferrell v. Commonwealth, 11 Va. App. 380, 388, 399 S.E.2d 614, 618–19 (1990); Bright v. Commonwealth, 4 Va. App. 248, 251, 356 S.E.2d 443, 444 (1987); Guynn v. Commonwealth, 220 Va. 478, 480, 259 S.E.2d 822, 823–24 (1979); Sullivan v. Commonwealth, 210 Va. 201, 203–04, 169 S.E.2d 577, 579–80 (1969); Fout v. Commonwealth, 199 Va. 184, 190–91, 98 S.E.2d 817, 821–22 (1957); Williams v. Commonwealth, 193 Va. 764, 770–71, 71 S.E.2d 73, 76 (1952); Drinkard v. Commonwealth, 163 Va. 1074, 1081–84, 178 S.E. 25, 27–29 (1935); Myers v. Commonwealth, 132 Va. 746, 759–62, 111 S.E. 463, 467–68 (1922).

OTHER RELEVANT DECISIONS:

Ford v. Commonwealth, 28 Va. App. 249, 259–61, 503 S.E.2d 803, 807–08 (1998); Caccioppo v. Commonwealth, 20 Va. App. 534, 538–40, 458 S.E.2d 592, 594–95 (1995); Schaum v. Commonwealth, 215 Va. 498, 501, 211 S.E.2d 73, 75–76 (1975); Christian v. Commonwealth, 210 Va. 117, 119–20, 168 S.E.2d 112, 114 (1969); Wilborne v. Commonwealth, 182 Va. 63, 66–69, 28 S.E.2d 1, 2–4 (1943); Stallard v. Commonwealth, 130 Va. 769, 775–77, 107 S.E. 722, 724–25 (1921); Branch v. Commonwealth, 100 Va. 837, 839–40, 41 S.E. 862, 863 (1902).

PRACTICE COMMENTARY: Instruction No. 12.500 deals with the permissible inference of burglary that may be drawn from exclusive possession of recently stolen property, but allows the jury to reject the inference if it has a reasonable doubt as to guilt upon consideration of all the evidence. The instruction assumes that the jury has been fully instructed as to the burden of proof and that a defendant in a criminal case is not required to testify and has no burden to produce any evidence.

Proof beyond a reasonable doubt does not require the Commonwealth to negate remote possibilities. *Christian, 210 Va. at 120, 168 S.E.2d at 114.* As can be seen from a comparison of Instruction No. 12.500 with Instruction No. 36.300, Larceny—Possession Inference, the other inculpatory circumstances that must first be found to exist before the inference from exclusive possession of recently stolen items arises are not the same in burglary and larceny cases. The manner in which the inference operates in burglary and larceny cases, however, is "practically the same." *Drinkard, 163 Va. at 1083, 178 S.E. at 28. See also Myers, 132 Va. at 765, 111 S.E. at 469–70.*

A number of cases illustrate the additional inculpatory circumstances that must be established before the inference that a defendant is guilty of burglary may be drawn. *Guynn, 220 Va. at 480, 259 S.E.2d at 824* (proof that defendant attempted to sell stolen items on the night of the burglary was sufficient to sustain conviction); *Fields v. Commonwealth, 215 Va. 120, 121, 207 S.E.2d 822, 823*

(1974) (where there was evidence that a check was missing from the complaining witness' office but no evidence that a breaking and entering had occurred, defendant's mere possession of the check was not enough to sustain a conviction for burglary); *Drinkard, 163 Va. at 1081–82, 178 S.E.2d at 27* (proof that the defendant accompanied a friend to a store where the friend attempted to sell a recently stolen bedspread was insufficient to establish that the defendant was in sole or even joint possession of the bedspread). *See Myers, 132 Va. at 761, 111 S.E. at 467–68* (listing of other relevant circumstances). The notion of recentness, however, is a question of fact to be determined by the trier of fact. *Sullivan, 210 Va. at 203–04, 169 S.E.2d at 579–80.* No definite time can be fixed as to when, as a matter of law, possession is or is not recent. *Wilborne, 182 Va. at 68–69, 28 S.E.2d at 3–4* ("[r]ecency of possession is ordinarily a question for the jury"); *Stallard, 130 Va. at 777, 107 S.E. at 724–25.* See also Instruction No. 36.300, Larceny—Possession Inference on the meaning of "recently" and "exclusive possession." In *Caccioppo*, the jury was permitted to consider evidence not only that the defendant possessed the stolen property alleged in the indictment, but also other items stolen at the time of the burglary. *20 Va. App. at 538–39, 458 S.E.2d at 594–95.*

In *Fout*, the Supreme Court of Virginia disapproved an instruction providing that, under the circumstances stated in the instruction, if the jury believed the property had been found in the defendant's exclusive possession, then the defendant was presumed to be the individual who committed the breaking and entering, stating:

> [I]t would have been better if the [trial] court . . . had told the jury, substantially, that if they believed the recited circumstances had been established and the exclusive possession of the stolen goods shortly thereafter had been unexplained or falsely denied, this was sufficient to raise an inference that the defendants were guilty of the breaking and entering, and that if such inference, taking into consideration the whole evidence, warranted a belief beyond a reasonable doubt that the defendants committed the offense charged, then it was the duty of the jury to find them guilty.
>
> *199 Va. at 194, 98 S.E.2d at 824.*

In *Myers*, after reviewing applicable case law and other authorities, the Court held that

> "the trial court committed no error in refusing to give [an] instruction . . . which, in substance, would have made the court say to the jury, as a conclusion of law, that they could not consider the evidence as to the possession of the stolen goods, even though they might believe from the evidence that there were other inculpatory circumstances proved, and other evidence of guilty conduct of both of the accused, besides the bare possession of the stolen property."
>
> *132 Va. at 759–62, 111 S.E. at 467–68.*

An instruction on this inference was held not to violate the defendant's

constitutional right not to testify when given in conjunction with instructions that the defendant does not have to testify and that the defendant has no burden to produce any evidence. *Patrick, 50 Va. App. at 652–56, 653 S.E.2d at 289–91.*

ALERTS:

• Counsel should be cautious with respect to some older cases, which may partially have relied upon principles of law that have since been rejected as unconstitutional related to presumptions, burden-shifting, and requirements for the defendant to explain his possession of recently stolen goods. *Stokes v. Warden, 226 Va. 111, 117–18, 306 S.E.2d 882, 885 (1983)*; *Sandstrom v. Montana, 442 U.S. 510, 521–24 (1979)*; *see also Francis v. Franklin, 471 U.S. 307, 313–14 (1985).*

• The Due Process Clause does not prohibit the use of a permissive inference as a procedural device that shifts to a defendant the burden of producing some evidence contesting a fact that may otherwise be inferred, provided that the prosecution retains the ultimate burden of proof beyond a reasonable doubt. *Dobson v. Commonwealth, 260 Va. 71, 74–75 531 S.E.2d 569, 571 (2000).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.2-1

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-10, 4-11[b], 4-15[b], 4-15[c][1]

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking § 15

Instruction No. 12.510

Inference of Criminal Intent

When the defendant unlawfully enters [a dwelling house; an adjoining, occupied outhouse; an office; a shop; a manufactured home; a storehouse; a warehouse; a banking house; a house; a ship; a vessel; a river craft; a railroad car; an automobile used as a dwelling; a truck used as a dwelling; a trailer used as a dwelling; a building permanently affixed to realty]**, you may infer that the entry was made with criminal intent. The specific criminal intent with which such entry is made may be inferred from the surrounding facts and circumstances, unless, from all the evidence, you have a reasonable doubt as to whether the defendant had such specific criminal intent.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Jones v. Commonwealth, 279 Va. 295, 299–300, 687 S.E.2d 738, 740 (2010); *Vincent v. Commonwealth, 276 Va. 648, 651–55, 668 S.E.2d 137, 139–41 (2008)*; *Velasquez v. Commonwealth, 276 Va. 326, 328–31, 661 S.E.2d 454, 455–57 (2008)*; *Scott v. Commonwealth, 228 Va. 519, 524, 323 S.E.2d 572, 575 (1984)*; *Ridley v. Commonwealth, 219 Va. 834, 836–37, 252 S.E.2d 313, 314–15 (1979)*; *Tompkins v. Commonwealth, 212 Va. 460, 461–62, 184 S.E.2d 767, 768 (1971)*.

PRACTICE COMMENTARY: Although it may be inferred that an unlawful entry was made for an unlawful purpose, the specific criminal intent with which it is done is a conclusion for the jury to draw from the evidence. It is improper for the court to suggest the specific criminal intent in the jury instructions. *Velasquez, 276 Va. at 330, 661 S.E.2d at 456–57*.

Although the Court of Appeals approved a different instruction in *Hucks v. Commonwealth, 33 Va. App. 168, 176, 531 S.E.2d 658, 661–62 (2000)*, such an instruction is no longer proper. *Velasquez, 276 Va. at 330 n.4, 661 S.E.2d at 456–57 n.4*.

Voluntary intoxication not a defense. Regarding the rejection of a theory of voluntary intoxication as a defense, see *Chittum v. Commonwealth, 211 Va. 12, 17–18, 174 S.E.2d 779, 782–83 (1970)* (holding that "[v]oluntary drunkenness, where it has not produced permanent insanity, is [n]ever an excuse for crime; [e]xcept, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree") and *Brenan v. Commonwealth, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945)* (an instruction setting up the defendant's voluntary intoxication as a defense to a robbery charge was properly rejected on the ground that, "[e]ven if there had been evidence of drunkenness, under the decisions of this [C]ourt, it would have been no excuse for the crime"). See also the Sources & Authority statement for Instruction No. 53.200, Intoxication—Voluntary.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

Charles E. Friend and Kent Sinclair, THE LAW OF EVIDENCE IN VIRGINIA §§ 4-10, 4-11[b], 4-15[b]

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.600

Breaking—Definition

Breaking, as used in these instructions, is the use of some force, however slight, to gain entry. [Breaking may be actual or constructive. Actual breaking requires the use of physical force, however slight. Constructive breaking requires the use of threats, fraud, trickery, conspiracy, or other evil conduct designed to prompt the victim to let the defendant inside.]

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Pooler v. Commonwealth, 71 Va. App. 214, 222-24, 834 S.E.2d 530, 534–35 (2019); Finney v. Commonwealth, 277 Va. 83, 88–90, 671 S.E.2d 169, 172–74 (2009); Lay v. Commonwealth, 50 Va. App. 330, 334–36, 649 S.E.2d 714, 715–16 (2007); Hitt v. Commonwealth, 43 Va. App. 473, 480, 598 S.E.2d 783, 786 (2004); Robertson v. Commonwealth, 31 Va. App. 814, 820–22, 525 S.E.2d 640, 644 (2000); Broady v. Commonwealth, 16 Va. App. 281, 289–90, 429 S.E.2d 468, 473–74 (1993); Doan v. Commonwealth, 15 Va. App. 87, 99, 422 S.E.2d 398, 404–05 (1992); Johnson v. Commonwealth, 221 Va. 872, 876, 275 S.E.2d 592, 594–95 (1981); Davis v. Commonwealth, 132 Va. 521, 523–24, 110 S.E. 356, 357 (1922); Clarke v. Commonwealth, 66 Va. (25 Gratt.) 908, 911, 919 (1874); Finch v. Commonwealth, 55 Va. (14 Gratt.) 643, 645–46 (1858).

PRACTICE COMMENTARY: If breaking is not a factual issue, use only the first sentence of the instruction. Otherwise, include the portion of the instruction within the brackets that is appropriate to the issues in the case. *See Lay, 50 Va. App. at 334–35, 649 S.E.2d at 715–16.*

The concept of breaking is the same for burglary, house-breaking, and storebreaking. Breaking may be either actual or constructive. Actual breaking presupposes some measure of physical force. As the court ruled in *Finch*, an entry through a door that was so closed as to come within the casing of the door and require some force to open it constituted breaking even though there was no fastening of any other kind on the door. "If . . . a party shall by even slight force remove or displace any thing attached to the house as part thereof, and relied upon by the occupant for safety of the house, it is housebreaking within the meaning of the statute." *Finch, 55 Va. at 645–46*. The court has also explained that "[m]erely pushing open a door, turning the key, lifting the latch, or resort to other slight physical force is sufficient." *Johnson, 221 Va. at 876, 275 S.E.2d at 594–95; Davis, 132 Va. at 523, 110 S.E. at 357.*

As opposed to actual breaking, constructive breaking requires no showing of force. Rather, one must negate the voluntariness of the occupant's consent to defendant's entry by showing that the defendant used intimidation, threats, conspiracy, trickery, or fraud to gain admission. *Lay, 50 Va. App. at 334–35, 649 S.E.2d at 716; Doan, 15 Va. App. at 99, 422 S.E.2d at 404–05; Clarke, 66 Va. at 911*, 919. The first sentence of this instruction has been held to instruct on both constructive breaking and actual breaking. *Lay, 50 Va. App. at 334–36, 649 S.E.2d at 715–16.*

Permission.

It is well-settled that a breaking and entering must be contrary to the will of the occupier of the premises. A person does not "break" into a dwelling when they

have permission to enter the dwelling and act in accordance with that permission. *Snyder v. Commonwealth, 220 Va. 792, 799, 263 S.E.2d 55 (1980).* Thus, where one has a ready and lawful mode of entering upon the premises, the fact that he performs a larcenous act while on the premises may not suffice to convict him of burglary. One having the relationship of friend and companion to the owner of the house, with express right to enter the premises at any time of day or night and to eat and sleep there whenever she pleased, took money therefrom contrary to the will of the owner, she was not guilty of breaking and entering. *Davis, 132 Va. at 523–24, 110 S.E. at 357.*

In contrast, a servant or caretaker who is fully authorized to enter for purposes within the scope of employment, who enters "for the purpose of carrying out a previously formed design to commit a felony" is guilty of burglary. *Id.* Similarly, maintaining a romantic relationship with the occupant and having permission to be at the residence only when specifically invited by the occupant did not constitute permission to enter at another time without an invitation. *Pooler v. Commonwealth, 71 Va. App. at 224, 834 S.E.2d at 535.*

Entry into a bank during hours when it is open to the public is not a breaking even though a closed door must be opened, and intent to rob does not convert the entry into a constructive breaking. *Johns v. Commonwealth, 10 Va. App. 283, 285–89, 392 S.E.2d 487, 488–90 (1990).*

Breaking out of a building for the purpose of escaping does not constitute burglary in the absence of a statute that so provides. *Bruce v. Commonwealth, 22 Va. App. 264, 269, 469 S.E.2d 64, 67 (1996).* However, breaking to facilitate re-entry or entry by others for the purpose of committing a crime does constitute a breaking. *Id. at 269–70, 469 S.E.2d at 67–68.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.610

Entering—Definition

Entering occurs whenever any part of a person's body comes within the premises.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Franklin v. Commonwealth, 28 Va. App. 719, 721–22, 508 S.E.2d 362, 363–64 (1998).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.620

Dwelling House—Definition

A dwelling house is a building used for habitation. Habitation or occupancy includes not only sleeping, but other dwelling-related activities such as preparing and consuming meals, bathing, and other day-to-day activities traditionally associated with habitation. The Commonwealth does not need to prove that the building is inhabited at regular intervals.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-78.

Case Authority:

Johns v. Commonwealth, 53 Va. App. 742, 746–49, 675 S.E.2d 211, 213–15 (2009); Giles v. Commonwealth, 277 Va. 369, 373–76, 672 S.E.2d 879, 882–84 (2009); Hitt v. Commonwealth, 43 Va. App. 473, 480–83, 598 S.E.2d 783, 786–88 (2004); Johnson v. Commonwealth, 18 Va. App. 441, 446–48, 444 S.E.2d 559, 562–63 (1994); Rash v. Commonwealth, 9 Va. App. 22, 25–27, 383 S.E.2d 749, 751–52 (1989); Compton v. Commonwealth, 190 Va. 48, 53–55, 55 S.E.2d 446, 448–49 (1949); Page v. Commonwealth, 67 Va. (26 Gratt.) 943, 948–49 (1875).

Practice Commentary: In considering whether a home was a "dwelling house," the Court in *Giles* examined the contents of the house and the victim's behavior in relation to the house. The Court cited the following evidence in concluding that the house was used for habitation:

> The house contained furniture in three bedrooms, a living room, family room, and kitchen, as well as quilts, blankets, sheets, towels, and bathroom supplies. The house had active electricity and water services, and the kitchen was stocked with food in the pantry, cabinets, and refrigerator. [The victim] had sleeping quarters in the house, and spent at least one night there over a weekend ten days prior to the break in on September 28, 2005. [The victim] had also stayed in the house at least once or twice per month in the three months following his mother's death on June 28, 2005.

277 Va. at 375–76, 672 S.E.2d at 883.

Giles contrasts with *Johns*, where the Court of Appeals held that the evidence did not establish that the home was a "dwelling house." *53 Va. App. at 748–49, 675 S.E.2d at 214–15*. The owner of the home in *Johns* did not occupy it, nor did the home contain furniture or any other items normally found in an inhabited residence. Moreover, the home in *Johns* was undergoing renovations so it could be sold, rather than inhabited by its current owner. *Id.*

In *Grimes v. Commonwealth*, the Court concluded that the "crawl space," which was "structurally part of the house," was "physically contained" within the home's "four exterior walls," and contained "integral utilities," fell within the plain meaning of the term "dwelling house." *288 Va. 314, 317–19, 764 S.E.2d 262, 264–65 (2014).*

Breaking and entering of one of the rooms of a private dwelling house, where the entrance into the house occurred without breaking, is not burglary. *Hitt, 43 Va. App. at 478–483, 598 S.E.2d at 785–88. See also Lacey v. Commonwealth, 54 Va. App. 32, 44, 675 S.E.2d 846, 852 (2009)* (defendant's entry through an open garage door and subsequent breaking of an interior door did not constitute a breaking). A separate apartment within a dwelling, however, can be the subject of a burglary.

Beck v. Commonwealth, 66 Va. App. 259, 267, 784 S.E.2d 310, 314 (2016).

ALERTS:

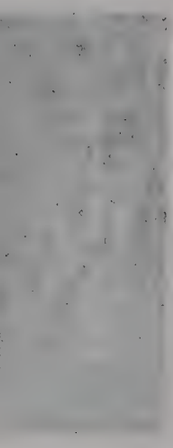
None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21



Instruction No. 12.630

Implement—Definition

You are instructed that an implement is [a device, apparatus, instrument, or equipment used in a trade, vocation, or profession; an object used in performing an operation or carrying on work, such as an instrument or apparatus necessary in the practice of a vocation or profession]**.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-94.

CASE AUTHORITY:

Williams v. Commonwealth, 50 Va. App. 337, 345, 649 S.E.2d 717, 721 (2007).

PRACTICE COMMENTARY: An ordinary purse is neither a tool nor an implement under this statute. *Edwards v. Commonwealth, 53 Va. App. 402, 410–12, 672 S.E.2d 894, 897–98 (2009)*. For a more in-depth treatment of the meaning of a burglarious tool see Practice Commentary to Instruction No. 12.400.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

Instruction No. 12.640

Tool—Definition

You are instructed that a tool is [an instrument, such as a hammer or saw, used or worked by hand; an implement or object used in performing an operation or carrying on work of any kind]**.**

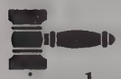
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-94.

CASE AUTHORITY:

Williams v. Commonwealth, 50 Va. App. 337, 343, 649 S.E.2d 717, 720 (2007); Moss v. Commonwealth, 29 Va. App. 1, 4–5, 509 S.E.2d 510, 511–12 (1999).



PRACTICE COMMENTARY: An ordinary purse is neither a tool nor an implement under this statute. *Edwards v. Commonwealth, 53 Va. App. 402, 410–12, 672 S.E.2d 894, 897–98 (2009)*. For a more in-depth treatment of the meaning of a burglarious tool see Practice Commentary to Instruction No. 12.400.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Burglary and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.1–9.4

MICHIE'S JURISPRUDENCE, Burglary and Housebreaking §§ 1–21

CHAPTER 13

COMPUTER CRIMES

Scope Note

Instruction No. 13.100 Computer Fraud—General

Instruction No. P13.100(a) Computer Fraud—General (Felony)

Instruction No. P13.100(b) Computer Fraud—General (Class 1 Misdemeanor)

Instruction No. 13.200 Computer Usage—Definition

Instruction No. 13.300 Computer Trespass and Lesser Included Offenses

Instruction No. P13.300(a) Computer Trespass (Felony)

Instruction No. P13.300(b) Computer Trespass (Class 1 Misdemeanor)

Instruction No. 13.310 Computer Trespass—Recording Keystrokes (Felony)

Instruction No. P13.310 Computer Trespass—Recording Keystrokes (Felony)

Instruction No. 13.320 Computer Trespass—Recording Keystrokes (Misdemeanor)

Instruction No. P13.320 Computer Trespass—Recording Keystrokes (Misdemeanor)

Instruction No. 13.330 Computer Trespass—Installing Software (Felony)

Instruction No. P13.330(a) Computer Trespass—Installing Software (Felony)

Instruction No. P13.330(b) Computer Trespass—Installing Software (Class 1 Misdemeanor)

Instruction No. 13.340 Computer Trespass—Installing Software on Five or More Computers

Instruction No. P13.340(a) Computer Trespass—Installing Software on Five or More Computers (Felony)

Instruction No. P13.340(b) Computer Trespass—Installing Software on Five or More Computers (Class 1 Misdemeanor)

Instruction No. 13.400 Computer Invasion of Privacy

Instruction No. P13.400(a) Computer Invasion of Privacy (Felony)

Instruction No. P13.400(b) Computer Invasion of Privacy (Class 1 Misdemeanor)

Instruction No. 13.500 Harassment by Computer

Instruction No. P13.500 Harassment by Computer

Instruction No. 13.600 Fraud by Electronic Communication

Instruction No. P13.600 Fraud by Electronic Communication

Instruction No. 13.700 Theft of Computer Services

Instruction No. P13.700(a) Theft of Computer Services (Felony)

Instruction No. P13.700(b) Theft of Computer Services (Class 1 Misdemeanor)

SCOPE NOTE

The Virginia Computer Crimes Act, Chapter 5, Article 7.1 of Title 18.2, establishes criminal and civil liability for the unauthorized use of computers. The crimes specifically defined in the Act are computer fraud, transmission of unsolicited bulk commercial electronic mail (spam), computer trespass, computer invasion of privacy, using a computer to gather identifying information, theft of computer services, personal trespass by computer, malicious personal trespass by computer, and harassment by computer. In addition, Va. Code Ann. § 18.2-152.14 expands the crime of forgery to include the creation, alteration, or deletion of any computer data that if done on a tangible document would be deemed forgery; Va. Code Ann. § 18.2-152.15 makes willful use of encryption to further any criminal activity a Class 1 misdemeanor, separate and distinct from the predicate criminal activity; and Va. Code Ann. § 18.2-152.8 lists computer related personal property subject to embezzlement. For purposes of the Act, specific words or phrases are defined at Va. Code Ann. § 18.2-152.2.

Instruction No. 13.100, based on Va. Code Ann. § 18.2-152.3, deals with computer fraud.

Instruction No. 13.200 defines computer usage in the terms employed in Va. Code Ann. § 18.2-152.2 and is designed to be used with the instructions on specific crimes.

Va. Code Ann. § 18.2-152.4 prohibits eight types of computer trespass. Instruction No. 13.300 covers the first six of these: removing, halting, or disabling computer data or software; causing a computer to malfunction; altering or erasing computer data; using a computer to effect the creation or alteration of a financial instrument or of an electronic transfer of funds; using a computer to cause physical injury to the property of another; and using a computer network to make an unauthorized copy. Instruction Nos. 13.310 and 13.320 covers computer trespass by recording keystrokes. Instruction No. 13.330 covers computer trespass by installing harmful software. Instruction No. 13.340 covers computer trespass by installing software on five or more computers.

Instruction No. 13.400 covers the crime of computer invasion of privacy. Va. Code Ann. § 18.2-152.5.

Instruction No. 13.500 covers the crime of harassment by computer. Va. Code Ann. § 18.2-152.7:1.

Instruction No. 13.600 covers fraud by electronic communication. Va. Code Ann. § 18.2-152.7:2.

Instruction No. 13.700 covers theft of computer services. Va. Code Ann. § 18.2-152.6.

There are no instructions prepared for using a computer to gather identifying information, Va. Code Ann. § 18.2-152.5:1, theft of computer services, Va. Code Ann. § 18.2-152.6, personal trespass by computer, Va. Code Ann. § 18.2-152.7, or transmission of unsolicited bulk commercial electronic mail, Va. Code Ann. § 18.2-152.3:1.

Instruction No. 13.100

Computer Fraud—General

The defendant is charged with the crime of computer fraud. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [used a (computer; computer network) when the defendant knew or reasonably should have known that the defendant had no right, agreement, or permission to use the (computer; computer network), or that the defendant acted in a manner knowingly exceeding such right, agreement, or permission]**; and**

(2) **That the defendant used the** [computer; computer network] [to obtain property or services by false pretenses; to embezzle; to commit larceny; to convert the property of another]**; and**

(3) **That the value of the property or services obtained was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the crime of computer fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged, but has not proved beyond a reasonable doubt that the value of the property or services obtained by computer fraud was $1,000 or more, then if you find beyond a reasonable doubt that the property or services obtained by the computer fraud was of some value (there need be no proof of a minimum or specific value), you shall find the defendant guilty of the misdemeanor of computer fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime or has failed to prove beyond a reasonable doubt that the property or services obtained was of some value, then you shall find the defendant not guilty.

Instruction No. P13.100(a)

Computer Fraud—General (Felony)

You have found the defendant guilty of the crime of computer fraud.

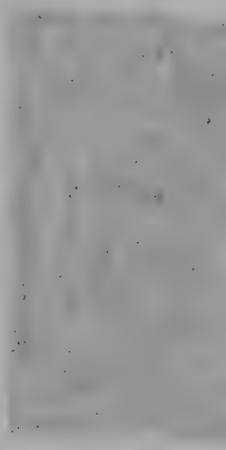
Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.



Instruction No. P13.100(b)

Computer Fraud—General (Class 1 Misdemeanor)

You have found the defendant guilty of the misdemeanor of computer fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-152.2, 18.2-152.3.

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020); *DiMaio v. Commonwealth, 272 Va. 504, 509–10, 636 S.E.2d 456, 459–60 (2006).*

PRACTICE COMMENTARY: This instruction combines instructions for the crimes of felony and misdemeanor computer fraud and provides the basis for finding felony computer fraud in Element 3. Depending on the circumstances of the case, Element 3 may be omitted.

For a case regarding establishment of value necessary for different gradations of the offense, see *DiMaio, 272 Va. at 509–10, 636 S.E.2d at 459–60.*

A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.200

Computer Usage—Definition

A person uses a computer or computer network when [he; she] **causes or attempts to cause a computer or computer network to perform or stop performing computer operations.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.2.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The statute contains additional definitions that can be used as instructions in appropriate cases.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30, Trespass §§ 2, 13

Instruction No. 13.300

Computer Trespass and Lesser Included Offenses

The defendant is charged with the crime of computer trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [temporarily or permanently removed, halted, or disabled computer data, computer programs or computer software from a computer or computer network; caused a computer to malfunction, regardless of how long the malfunction persisted; altered, disabled, or erased any computer data, computer programs, or computer software; used a computer or computer network to effect the creation or alteration of a financial instrument or of an electronic transfer of funds; used a computer or computer network to cause physical injury to the property of another; used a computer network to make or cause to be made an unauthorized copy in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by or produced by a computer or computer network]; **and**

(2) **That the defendant acted with malice, or through intentionally deceptive means and without authority; and**

(3) **(a) That the value of the property damaged was $1,000 or more and the defendant acted with malicious intent; or**

(b) That the defendant did so for the purposes of affecting a computer that is exclusively [for the use of; used by; used for] [the Commonwealth or any local government within the Commonwealth or any department or agency thereof; a provider of telephone, including wireless or voice over Internet protocol, oil, electric, gas, sewer, wastewater, or water service to the public].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the crime of felony computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but has failed to prove that the value of the property damaged was $1,000 or more or that the defendant did so for the purposes of affecting a computer that is exclusively for the use of, used by, or used for the Commonwealth or public provider, then you shall find the defendant guilty of the misdemeanor of computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.300(a)

Computer Trespass (Felony)

You have found the defendant guilty of the crime of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P13.300(b)

Computer Trespass (Class 1 Misdemeanor)

You have found the defendant guilty of the misdemeanor of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.4.

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020).

PRACTICE COMMENTARY: This instruction combines instructions for the crimes of felony and misdemeanor computer trespass and provides two separate bases for a finding of the felony offense. Depending on the circumstances of the case, only Element 3(a) or Element 3(b) should be given.

For a case regarding establishment of value necessary for different gradations of the offense, see *DiMaio v. Commonwealth, 272 Va. 504, 509–10, 636 S.E.2d 456, 456–60 (2006).*

A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

For a definition of malice, see Instruction No. 37.200, Malice—Definition.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.310

Computer Trespass—Recording Keystrokes (Felony)

The defendant is charged with the crime of computer trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [installed; caused to be installed; collected information through] **computer software that records all or a majority of the keystrokes made on the computer of** (name of computer's owner)**; and**

(2) **That the defendant acted with malicious intent.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.310

Computer Trespass—Recording Keystrokes (Felony)

You have found the defendant guilty of the crime of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specified amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.4(A)(8), (B).

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020).

PRACTICE COMMENTARY: A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

For an example definition of malice, see Instruction No. 37.200, Malice—Definition.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.320

Computer Trespass—Recording Keystrokes (Misdemeanor)

The defendant is charged with the crime of computer trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [installed; caused to be installed; collected information through] **computer software that records all or a majority of the keystrokes made on the computer of** (name of computer's owner);

(2) **That the defendant acted without the authorization of** (name of computer owner); **and**

(3) **That the defendant used intentionally deceptive means.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.320

Computer Trespass—Recording Keystrokes (Misdemeanor)

You have found the defendant guilty of the crime of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specified amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.4(A)(8), (B).

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020).

PRACTICE COMMENTARY: A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

For an example definition of malice, see Instruction No. 37.200, Malice—Definition.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.330

Computer Trespass—Installing Software (Felony)

The defendant is charged with the crime of computer trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [installed; caused to be installed] **on the computer of** (name of computer's owner) **computer software for the purpose of** [taking control of the computer so that it can cause damage to another computer; disabling or disrupting the ability of the computer to share or transmit instructions or data to (other computers; any related computer equipment or devices, including but not limited to printers, scanners, or fax machines)**; and**

(2)

(a) **That the value of the property damaged was $1,000 or more and the defendant acted with malicious intent; or**

(b) **That the defendant, with malicious intent or through intentionally deceptive means and without authority, did so for the purposes of affecting a computer that is exclusively** [for the use of; used by; used for] [the Commonwealth or any local government within the Commonwealth or any department or agency thereof; a provider of telephone, including wireless or voice over Internet protocol, oil, electric, gas, sewer, wastewater, or water service to the public].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged but has failed to prove that the value of the property damaged was $1,000 or more, or that the defendant did so for the purposes of affecting a computer that is exclusively for the use of, used by, or used for the Commonwealth or public provider, then you shall find the defendant guilty of the misdemeanor of computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.330(a)

Computer Trespass—Installing Software (Felony)

You have found the defendant guilty of the crime of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P13.330(b)

Computer Trespass—Installing Software (Class 1 Misdemeanor)

You have found the defendant guilty of the misdemeanor of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.4(A)(9), (B).

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020).

PRACTICE COMMENTARY: This instruction combines instructions for the crimes of felony and misdemeanor computer trespass under Va. Code Ann. § 18.2-152.4(A)(9) and provides two separate bases for a finding of the felony offense. Depending on the circumstances of the case, only Element 3(a) or Element 3(b) should be given.

A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

For an example definition of malice, see Instruction No. 37.200, Malice—Definition.

Computer equipment or devices include, but are not limited to, printers, scanners, or fax machines. Va. Code Ann. § 18.2-152.4(A)(9).

For a case regarding establishment of value necessary for different gradations of the offense, see *DiMaio v. Commonwealth, 272 Va. 504, 509–10, 636 S.E.2d 456, 456–60 (2006).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.340

Computer Trespass—Installing Software on Five or More Computers

The defendant is charged with the crime of computer trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [installed; caused to be installed] **on the computer of** (name of computer's owner) **computer software for the purpose of** [taking control of the computer so that it can cause damage to another computer; disabling or disrupting the ability of the computer to share or transmit instructions or data to (other computers; any related computer equipment or devices, including but not limited to printers, scanners, or fax machines)]; **and**

(2) **That the defendant acted with malicious intent; and**

(3) **That the defendant installed computer software on more than five computers of** (name of computer's owner).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first and second elements of the crime as charged but has failed to prove that the defendant installed computer software on more than five computers, then you shall find the defendant guilty of the misdemeanor of computer trespass, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first and second elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.340(a)

Computer Trespass—Installing Software on Five or More Computers (Felony)

You have found the defendant guilty of the crime of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P13.340(b)

Computer Trespass—Installing Software on Five or More Computers (Class 1 Misdemeanor)

You have found the defendant guilty of the misdemeanor of computer trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.4(A)(9), (B).

CASE AUTHORITY:

Brewer v. Commonwealth, 71 Va. App. 585, 838 S.E.2d 557 (2020).

PRACTICE COMMENTARY: This instruction combines instructions for the crimes of felony and misdemeanor computer trespass under Va. Code Ann. § 18.2-152.4(A)(9) where the basis for a finding of the felony offense is acting with malicious intent to install software on five or more computers of another.

A cellular telephone can be rendered a computer for purposes of the Computer Crimes Act. *Brewer, 71 Va. App. at 594, 838 S.E. 2d at 561.*

For an example definition of malice, see Instruction No. 37.200, Malice—Definition.

Computer equipment or devices include, but are not limited to, printers, scanners, or fax machines. Va. Code Ann. § 18.2-152.4(A)(9).

For a case regarding establishment of value necessary for different gradations of the offense, see *DiMaio v. Commonwealth, 272 Va. 504, 509–10, 636 S.E.2d 456, 456–60 (2006).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; and Trespass §§ 2, 13

Instruction No. 13.400
Computer Invasion of Privacy

The defendant is charged with the crime of computer invasion of privacy. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant used a** [computer; computer network] [when the defendant knew or reasonably should have known that the defendant had no right, agreement, or permission to use the (computer; computer network), or that the defendant acted in a manner knowingly exceeding such right, agreement, or permission]**, to intentionally examine any** [employment information; salary information; credit information; financial information; identifying information such as (social security number; driver's license number; bank account number; credit or debit card number; personal identification number (PIN); electronic identification codes)] **relating to any other person; and**

(2) **That the defendant used the** [computer; computer network], **to examine the information after the time at which the defendant knew or should have known that the defendant was without authority to view the information displayed; and**

(3)

(a) **That the defendant violated this section after having been previously convicted of computer invasion of privacy or any substantially similar law of another state or the United States;** or

(b) **That the defendant sold or distributed such information to another;** or

(c) **That the defendant used such information in the commission of another crime.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of computer invasion of privacy, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but has failed to prove that the defendant violated this section after having been previously convicted of computer invasion of privacy or any substantially similar law of another state or the United States, or that the defendant sold or distributed such information to another; or that the defendant used such information in the commission of another crime, then you shall find the defendant guilty of the misdemeanor of computer invasion of privacy, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.400(a)

Computer Invasion of Privacy (Felony)

You have found the defendant guilty of the crime of computer invasion of privacy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P13.400(b)

Computer Invasion of Privacy (Class 1 Misdemeanor)

You have found the defendant guilty of the crime of computer invasion of privacy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.5.

CASE AUTHORITY:

Ramsey v. Commonwealth, 65 Va. App. 694, 698–701, 780 S.E.2d 624, 625–27 (2015).

PRACTICE COMMENTARY: This instruction combines instructions for the crimes of felony and misdemeanor computer invasion of privacy under Va. Code Ann. § 18.2-152.5(B)–(E) and provides three separate bases for a finding of the felony offense. Depending on the circumstances of the case, only Element 3(a), Element 3(b) or Element 3(c) should be given.

Va. Code Ann. § 18.2-152.5(F) provides that persons engaged in certain specified activities are exempt from the statute. When applicable, an instruction on those exemptions should be used.

A person, other than a law enforcement officer acting in performance of his official duties, who uses a computer to obtain, access, or record identifying information through material artifice, trickery, or deception is guilty of a Class 6 felony. Va. Code Ann. § 18.2-152.5:1(A). The use of the information is irrelevant if it was obtained without authorization or as a result of exceeding authorized access. For example, where a state trooper used the Virginia Criminal Information Network (VCIN) to examine criminal history and personal information without a criminal justice purpose, she violated the statute. See *Ramsey, 65 Va. App. at 700–01, 780 S.E.2d at 627.* Sale, distribution, or use of information obtained in the commission of another crime is a Class 5 felony. Va. Code Ann. § 18.2-152.5:1(B)–(C).

ALERTS:

• The words "identifying information" in this instruction are defined in Va. Code Ann. § 18.2-186.3(C)(iii)–(xiii). When applicable, an instruction setting forth those definitions should be used.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Fraud and Deceit § 30; Right of Privacy § 1; and Trespass §§ 2, 13

Instruction No. 13.500

Harassment by Computer

The defendant is charged with the crime of harassment by computer. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant used a** [computer; computer network] **to** [to communicate obscene language; make any suggestion or proposal of an obscene nature; threaten any illegal or immoral act]**; and**

(2) **That the defendant did so with the intent to** [coerce; intimidate; harass] (name of person)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Note:

Although the statute also includes "vulgar, profane, lewd, lascivious, or indecent language," Virginia's appellate courts have concluded the language must be "obscene" to satisfy constitutional concerns. See the Sources and Authority statement for this instruction, *infra*.

Instruction No. P13.500

Harassment by Computer

You have found the defendant guilty of the misdemeanor of harassment by computer.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.7:1.

CASE AUTHORITY:

Moter v. Commonwealth, 61 Va. App. 471, 477–82, 737 S.E.2d 538, 541–43 (2013); *Barson v. Commonwealth, 284 Va. 67, 71–74, 726 S.E.2d 292, 294–96 (2012).*

PRACTICE COMMENTARY: Where a defendant has the intent contemplated under the statute, i.e., an intent to coerce, intimidate, or harass (*mens rea*), and uses a computer or computer network to carry out that *mens rea*, the statute may be violated in any one of three ways: by communicating obscene language; by making a suggestion or proposal of an obscene nature; or by threatening an illegal or immoral act. When the communication threatens any illegal or immoral act, it need not satisfy the obscenity requirement. *Moter, 61 Va. App. at 477–80, 737 S.E.2d at 541–43.*

In *Barson,* the Supreme Court of Virginia ruled that the definition of obscene for purposes of this statute is the definition found in Va. Code Ann. § 18.2-372, which applies the test from *Miller v. California, 413 U.S. 15 (1973). 284 Va. at 72–74, 726 S.E.2d at 294–96.* That definition is:

> The word "obscene" where it appears in this article shall mean that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic or scientific value.

ALERTS:

• Although the statute recites "vulgar, profane, lewd, lascivious, or indecent language" in addition to "obscene" language, Virginia's appellate courts have determined that to pass constitutional muster, the language must actually be obscene. *Moter, 61 Va. App. at 478, 737 S.E.2d at 541–42* ("Merely vulgar, profane, lewd, or lascivious communications . . . do not violate Code § 18.2-152.7:1."); *Barson, 284 Va. at 74, 726 S.E.2d at 296.*

• For purposes of threatening an illegal or immoral act, the Court of Appeals has held that "[a]n illegal act violates the criminal code; an immoral act violates society's social code reflecting its collective sense of moral propriety." *Moter, 61 Va. App. at 479, 737 S.E.2d at 542.*

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Computer Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.1–15.13

MICHIE'S JURISPRUDENCE, Constitutional Law § 78; Fraud and Deceit § 30; Right of Privacy § 1; Telegraph and Telephone Companies § 2; and Trespass §§ 2, 13

Instruction No. 13.600

Fraud by Electronic Communication

The defendant is charged with the crime of perpetrating a fraud by electronic communication. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sent an electronically transmitted communication containing a false representation; and

(2) That the defendant did so with the intent to cause another person to spend money; and

(3) That such false representation caused such person to spend money.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P13.600

Fraud by Electronic Communication

You have found the defendant guilty of the misdemeanor of fraud by electronic communication.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.7:2.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

Instruction No. 13.700

Theft of Computer Services

The defendant is charged with the crime of theft of computer services. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant willfully obtained computer services; and

(2) That when the defendant obtained the services the defendant knew or reasonably should have known that the defendant had no right, agreement or permission [the defendant acted in a manner knowingly exceeding such right, agreement or permission] to obtain these computer services**; and**

(3) That the value of the services obtained was $2,500 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of theft of computer services, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but has failed to prove that the value of the services obtained was $2,500 or more, then you shall find the defendant guilty of the misdemeanor of theft of computer services, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

(3) That the value of the services obtained was $2,500 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but has failed to prove that the value of the services obtained was $2,500 or more, then you shall find the defendant guilty of the felony of theft of computer services, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one of the first two elements of the crime as charged, then you shall find the defendant not guilty of the felony of theft of computer services and you shall not fix the punishment but your verdict shall be returned as such.

Instruction No. P13.700(a)

Theft of Computer Services (Felony)

You have found the defendant guilty of the crime of theft of computer services.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(3) A fine of a specific amount, but not more than $2,500; or

Instruction No. P13.700(b)

Theft of Computer Services (Class 1 Misdemeanor)

You have found the defendant guilty of the misdemeanor of theft of computer services.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.6.

***CASE AUTHORITY*:**

None.

PRACTICE COMMENTARY: "Computer services" is defined as, "computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection therewith." Va. Code Ann. § 18.2-152.2.

***ALERTS*:**

None.

CHAPTER 14

CONSPIRACY

Scope Note

Instruction No. 14.100 Conspiracy—General

Instruction No. P14.100 Conspiracy—General

Instruction No. 14.150 Conspiracy Agreement Inferred from Acts or Conduct

Instruction No. 14.200 Completion of Crime Not Necessary

Instruction No. 14.220 Two-Party Minimum

Instruction No. 14.260 Withdrawal or Change of Mind

Instruction No. 14.500 Conspiracy to Rig a Government Bid

Instruction No. P14.500 Conspiracy to Rig a Government Bid

SCOPE NOTE

These instructions cover the principal issues that relate to the crime of conspiracy. Instruction No. 14.100, based on Va. Code Ann. §§ 18.2-22, 18.2-23 and the case law, defines the basic elements of the offense. Instruction P14.100 is offered as a model punishment instruction based upon a conspiracy to commit a felony. The *Practice Commentary* that accompanies those instructions addresses the need to modify the punishment instruction based upon the nature of the underlying offense. Instruction No. 14.150 explains "agreement" in the context of conspiracy. Instruction No. 14.200 emphasizes that completion of the underlying felony is not a necessary element of the crime of conspiracy. Instruction No. 14.220 covers the two-party minimum that is necessary to form a criminal conspiracy. Instruction No. 14.260 is used in cases where the defendant alleges that he withdrew from or changed his mind about participating in the conspiracy. Instruction No. 14.500 deals with conspiracy to rig a government bid.

Several other points should be noted regarding the law of conspiracy. First, Va. Code Ann. § 18.2-22 specifically is limited to any person who shall "conspire, confederate or combine with another . . . to commit a felony." The common law and the law of other jurisdictions are not so limited. Certain conspiracies to commit misdemeanor offenses, however, are recognized in Virginia. For example, Va. Code Ann. § 18.2-256, which covers conspiracies that arise regarding drug-related offenses, is not limited to felonies. Similarly, Va. Code Ann. § 18.2-499, which deals with conspiracies to injure another person in his business or profession, punishes such a conspiracy as a Class 1 misdemeanor.

In contrast to federal law and the law of most states, Virginia does not require proof of an overt act in order to convict the defendant of conspiracy: "In law the offense is the combination for the purpose, and no overt act is necessary to constitute it." *Crump v. Commonwealth, 84 Va. 927, 941–42, 6 S.E. 620, 628 (1888)*; see also *Gray v. Commonwealth, 260 Va. 675, 680, 537 S.E.2d 862, 865 (2000)*; *Hodge v. Commonwealth, 7 Va. App. 351, 355, 374 S.E.2d 76, 78–79 (1988)*; *Ramsey v. Commonwealth, 2 Va. App. 265, 270–71, 343 S.E.2d 465, 469 (1986)*. The federal courts and most states require proof of an overt act, however slight, to be performed by at least one member of the conspiracy in furtherance of the conspirational objective. Indeed, it is often difficult to prove the existence of a conspiracy without reference to subsequent acts that appear to be consistent with the agreement. See, e.g., *Simpson v. Commonwealth, 227 Va. 557, 567–68, 318 S.E.2d 386, 392 (1984)*. Despite this practical problem, Virginia still adheres to the minority rule that proof of an overt act is not required. See Note, "Reforming the Law of Inchoate Crimes," 59 Va. L. Rev. 1234 (1973).

Co-conspirators are jointly responsible for the acts of all others done in furtherance of the conspirational objective. Moreover, this rule applies to acts that are done before the defendant enters into the conspiracy, because the defendant is assumed to have sanctioned the previous acts by joining the conspiracy. *Amato v. Commonwealth, 3 Va. App. 544, 553, 352 S.E.2d 4, 9 (1987)*; *Sands v. Commonwealth, 62 Va. 871, 895–96 (1872)*. Liability as a conspirator is not dependent on knowledge of the entire scope of the conspiracy. Knowledge need not extend to all the details of the conspiracy or the identity of all the other conspirators. *Brown v. Commonwealth, 10 Va. App. 73, 79, 390 S.E.2d 386, 389 (1990)*. The problem of joint responsibility among co-conspirators is closely related to the problem of liability among principals and accessories. Therefore, in many cases, it may be necessary to use the Conspiracy instructions in conjunction with the instructions in Chapter 3, Accomplices.

Va. Code Ann. Section 18.2-23.1 provides that once a defendant has been convicted of a

substantive offense, there can be no subsequent conviction for the underlying conspiracy. However, a conviction for conspiracy to distribute cocaine was affirmed when an act of distribution for which the defendant had previously been convicted was not relied upon to prove the conspiracy. The Court also held that a conspiracy to make successive distributions would support only one charge. *Bowman v. Commonwealth, 11 Va. App. 259, 264–66, 397 S.E.2d 886, 889–90 (1990).* The statute, however, does not prohibit conviction of both the completed substantive offense and the underlying conspiracy when those convictions occur in a single trial. *Boyd v. Commonwealth, 236 Va. 346, 348–51, 374 S.E.2d 301, 301–03 (1988)*; *Schwartz v. Commonwealth, 45 Va. App. 407, 438–43, 611 S.E.2d 631, 646–49 (2005).* See also *Stevens v. Commonwealth, 14 Va. App. 238, 243, 415 S.E.2d 881, 884 (1992).*

Discharge from prosecution for the substantive offense resulting from a failure to bring the defendant to trial within the time required by Va. Code Ann. § 19.2-243 also bars prosecution for conspiracy charges based on the same offense. *Clark v. Commonwealth, 4 Va. App. 3, 4, 353 S.E.2d 790, 790 (1987).*

Unlike federal law, Virginia courts require proof of conspiracy by evidence independent of the hearsay declaration of a co-conspirator before the hearsay declaration itself is admissible pursuant to Va. R. Evid. 2.803(0)(E). See *Jones v. Commonwealth, 11 Va. App. 75, 82, 396 S.E.2d 844, 848 (1990).* The factual determinations which are necessary predicates to rulings on the admissibility of evidence and the purposes for which it is admitted are for the trial judge and not the jury. The trial judge determines when a prima facie case of conspiracy is established. On factual issues relating to the admissibility of evidence, the burden of persuasion is proof by a preponderance of the evidence. *Rabeiro v. Commonwealth, 10 Va. App. 61, 64–65, 389 S.E.2d 731, 733 (1990).*

Where defendant has at least twice previously been convicted of a violent felony or conspiracy to commit a violent felony, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

Instruction No. 14.100

Conspiracy—General

The defendant is charged with the crime of conspiracy. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant entered into an agreement with one or more other persons; and

(2) That the agreement was that they were to commit (name of felony); **and**

(3) That both the defendant and [the other party; at least one other party] **to the agreement intended to commit** (name of felony).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P14.100

Conspiracy—General

You have found the defendant guilty of the crime of conspiracy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-22, 18.2-23 (B).

PRINCIPAL CASE AUTHORITY:

Merritt v. Commonwealth, 57 Va. App. 542, 558–59, 704 S.E.2d 158, 166–67 (2011); Wright v. Commonwealth, 224 Va. 502, 505–06, 297 S.E.2d 711, 713 (1982); Falden v. Commonwealth, 167 Va. 542, 544, 189 S.E. 326, 327 (1937).

OTHER RELEVANT DECISIONS:

Jones v. Commonwealth, 279 Va. 295, 301–02, 687 S.E.2d 738, 741 (2010); James v. Commonwealth, 53 Va. App. 671, 677–80, 674 S.E.2d 571, 574–76 (2009); Gray v. Commonwealth, 260 Va. 675, 680, 537 S.E.2d 862, 865 (2000); Combs v. Commonwealth, 30 Va. App. 778, 787–89, 520 S.E.2d 388, 392–93 (1999); McQuinn v. Commonwealth, 19 Va. App. 418, 425, 451 S.E.2d 704, 707–08 (1994); Stevens v. Commonwealth, 14 Va. App. 238, 241, 415 S.E.2d 881, 883 (1992); Johnson v. Commonwealth, 8 Va. App. 34, 38–39, 377 S.E.2d 636, 638–39 (1989); Amato v. Commonwealth, 3 Va. App. 544, 551–54, 352 S.E.2d 4, 8–10 (1987); Cartwright v. Commonwealth, 223 Va. 368, 372, 288 S.E.2d 491, 493–94 (1982); Floyd v. Commonwealth, 219 Va. 575, 580–81, 249 S.E.2d 171, 174–75 (1978); Smith v. Commonwealth, 212 Va. 662, 662–63, 187 S.E.2d 205, 205–06 (1972); Whited v. Commonwealth, 174 Va. 528, 532–34, 6 S.E.2d 647, 649–50 (1940).

PRACTICE COMMENTARY: Instruction P14.100 is offered as a model punishment instruction based upon a conspiracy to commit a felony. Conspiracies to commit felonies with a maximum penalty of less than five years, larceny of items with an aggregate value of $1,000.00 or more, and drug-related conspiracies all have different penalties, as set forth in Va. Code Ann. §§ 18.2-22, 18.2-23(B), and 18.2-256, respectively. The punishment instruction will need to be modified for those offenses as follows:

If the charge is conspiracy to commit a felony punishable by a maximum imprisonment of less than five years, the four punishment options appearing in the model instruction should be changed to read:

(1) A term of imprisonment of one (1) year; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $500.

If the charge is conspiracy to commit larceny of goods or merchandise with an aggregate value of $1,000.00 or more pursuant to Va. Code Ann. § 18.2-23(B), the punishment provision consists of only one option; accordingly, the four options appearing in the model instruction should be reduced to the following single

option: **imprisonment for not less than one year nor more than 20 years. (NOTE:** The statute does not authorize the imposition of a jail sentence or a fine as possible alternatives. See *Alerts).*

If the charge is conspiracy to commit a drug-related offense set forth in Va. Code Ann. § 18.2-256, the punishment provision should be changed to reflect the range of punishment options established for the specific offense that was the object of the conspiracy.

Agreement Required. In *Falden*, the Court defined conspiracy as "an agreement between two or more persons by some concerted action to commit an offense." *167 Va. at 544, 189 S.E. at 327.* The Court followed this definition in *Smith*, where the defendant was found in possession of heroin and quinine, a substance that is used to cut heroin. *212 Va. at 662–663, 187 S.E.2d at 205–206.* Despite the possession of these substances, the defendant was not guilty of conspiring to manufacture a controlled substance. *Id.* The court held that the evidence was insufficient for a conspiracy conviction because no agreement to undertake such manufacturing had been proved. *212 Va. at 662–63, 187 S.E.2d at 205–06.*

In *Floyd*, the court said that although there can be no conspiracy without an agreement, the conspiracy may be proven by circumstantial evidence. *219 Va. at 580–81, 249 S.E.2d at 174–75.* The Court then held that there was sufficient circumstantial evidence to convict the defendant, who was a division engineer for the railroad, of conspiracy to commit grand larceny in a scheme to defraud the railroad. See also *James, 53 Va. App. at 678–80, 674 S.E.2d at 575–76*; *Wright, 224 Va. at 505–06, 297 S.E.2d at 713.*

Spouses. The fact that the perpetrators of a crime are husband and wife does not, without more, create an inference that they conspired to commit the offense charged. *Combs, 30 Va. App. at 787–89, 520 S.E.2d at 392–93.*

Independent Action. In *Whited, 174 Va. at 532–34, 6 S.E.2d at 649–50*, the court reversed the conviction of a deputy sheriff who was charged with conspiracy to commit murder. The court distinguished concert of action (conspiracy to commit an illegal act) and independent, simultaneous action.

Aiding and Abetting. Aiding and abetting, combined with knowledge of the underlying crime, are sufficient to convict the defendant of conspiracy in the Federal courts. *Di Bonaventura v. United States, 15 F.2d 494, 495–96 (4th Cir. 1926).* Virginia has not explicitly adopted this rule.

Completion and Conviction of the Substantive Offense. Va. Code Ann. Section 18.2-23.1 provides that once a defendant has been convicted of a substantive offense, there can be no subsequent conviction for the underlying conspiracy. See *Ramsey v. Commonwealth, 2 Va. App. 265, 267, 343 S.E.2d 465, 467, n.1 (1986).* In *Bowman v. Commonwealth, 11 Va. App. 259, 263–64, 397 S.E.2d 886, 888–89 (1990)*, a divided panel held that the conviction of conspiracy to distribute cocaine was allowable if the act of distribution for which the defendant had previously been tried was not relied upon to prove the conspiracy. *Id. at 264, 397 S.E.2d at 889.* The

panel further held that a conspiracy to make successive distributions would support only one charge. *Id. at 264–66, 397 S.E.2d at 889–90.* The statute, however, does not prohibit conviction of both the completed substantive offense and the underlying conspiracy when the convictions occur in a single trial. *Boyd v. Commonwealth, 236 Va. 346, 348–51, 374 S.E.2d 301, 301–03 (1988)*; *Schwartz v. Commonwealth, 45 Va. App. 407, 438–43 (2005), 611 S.E.2d 631, 646–49 (2005)*; *Stevens v. Commonwealth, 14 Va. App. 238, 243, 415 S.E.2d 881, 884 (1992).*

Drug Offenses. In general, Instruction No.14.100 should be sufficient with regard to the elements of drug-related conspiracy offenses charged under Va. Code Ann. § 18.2-256. If necessary, the instruction may be modified to account for any additional elements of a particular offense. Instruction P14.100, however, will need to be modified to reflect the statutory requirement that punishment for those offenses must be set within the range of minimum and maximum punishments "prescribed for the offense, the commission of which was the object of the conspiracy." Va. Code Ann. § 18.2-256.

A conspiracy to distribute drugs may be shown by a series of drug transactions where one person sells drugs to a buyer who then resells them to a third party. See *Zuniga v. Commonwealth, 7 Va. App. 523, 527–32, 375 S.E.2d 381, 384–87 (1988).* As a general rule, however, a two-party drug sale, standing alone, does not constitute a conspiracy to distribute drugs because the transaction lacks the essential element of an agreement to commit a subsequent distribution offense together. *Feigley v. Commonwealth, 16 Va. App. 717, 722–24, 432 S.E.2d 520, 523–25 (1993).* For a discussion of how to determine when a drug sale shows a drug conspiracy, see *Edwards v. Commonwealth, 18 Va. App. 45, 47–49, 441 S.E.2d 351, 353–54 (1994)*; *Hudak v. Commonwealth, 19 Va. App. 260, 262–64, 450 S.E.2d 769, 770–72 (1994).* For an example of a single drug transaction constituting a conspiracy to distribute drugs, see *Richard v. Commonwealth, 72 Va. App. 598, 609–14, 851 S.E.2d 68, 73–76 (2020).*

Single and Multiple Agreements. A single agreement can form the basis for multiple violations of Va. Code Ann. § 18.2-22; an agreement to commit three crimes can form the basis for three convictions, each to be punished according to the severity of the criminal objective. *Cartwright, 223 Va. at 372, 288 S.E.2d at 493–94.* A single agreement to commit multiple drug offenses also constitutes multiple violations of Va. Code Ann. § 18.2-256. *Wooten v. Commonwealth, 235 Va. 89, 91–93, 368 S.E.2d 693, 694–95 (1988).* However, an agreement to defraud multiple individuals as part of a "Ponzi" or pyramid scheme supports only a single conspiracy count. *Smallwood v. Commonwealth, 72 Va. App. 119, 130, 841 S.E.2d 881, 886 (2020).*

Statements by co-conspirators made after completion of the crime are admissible against the declarant as evidence of an agreement, but not against any recipients. *Hudgins, 142 Va. at 637–38, 128 S.E. at 568.*

☞ ***PRACTICE POINTER:***

Under Va. Code Ann. § 18.2-22, venue is proper in any city or county where an

act in furtherance of the conspiracy took place, as well as the place where the conspiracy was entered into. Conspiracy is a continuing offense and venue may be proper in more than one place. *Chambliss v. Commonwealth, 62 Va. App. 459, 467, 749 S.E.2d 212, 216 (2013).* Because each member of a conspiracy is responsible for the acts of the others in furtherance of the conspiracy, a conspirator may be tried where any of those acts are performed, even if he is without knowledge of the particular act. *Brown v. Commonwealth, 10 Va. App. 73, 80–81, 390 S.E.2d 386, 390 (1990); see also Bonner v. Commonwealth, 62 Va. App. 206, 213, 745 S.E.2d 162, 166 (2013).*

Va. Code Ann. 18.2-23(C) also addresses venue as it provides that venue is proper in any county or city where any part of the conspiracy is planned or where any act toward the consummation of the conspiracy was done.

ALERTS:

• Discharge from prosecution for the substantive offense resulting from a failure to bring the defendant to trial within the time required by Va. Code Ann. § 19.2-243 also bars prosecution for conspiracy charges based on the same offense. *Clark v. Commonwealth, 4 Va. App. 3, 4, 353 S.E.2d 790, 790 (1987).*

• Unlike the penalty for grand larceny, the statutory penalty for conspiracy to commit larceny of goods or merchandise valued in aggregate at more than $500 does not permit the jury to consider the imposition of a jail sentence or of a fine as alternatives to incarceration in a state correctional facility. Va. Code Ann. § 18.2-23(B).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

Instruction No. 14.150

Conspiracy Agreement Inferred from Acts or Conduct

The existence of an agreement may be inferred from the actions or conduct of the parties.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None

PRINCIPAL CASE AUTHORITY:

Merritt v. Commonwealth, 57 Va. App. 542, 558–59, 704 S.E.2d 158, 166–67 (2011); Jones v. Commonwealth, 279 Va. 295, 301, 687 S.E.2d 738, 741 (2010); Gray v. Commonwealth, 260 Va. 675, 680, 537 S.E.2d 862, 865 (2000); Wright v. Commonwealth, 224 Va. 502, 505–06, 297 S.E.2d 711, 713 (1982); Floyd v. Commonwealth, 219 Va. 575, 580–81, 249 S.E.2d 171, 174–75 (1978).

OTHER RELEVANT DECISIONS:

Johnson v. Commonwealth, 58 Va. App. 625, 636, 712 S.E.2d 751, 756–57 (2011); *James v. Commonwealth, 53 Va. App. 671, 678, 674 S.E.2d 571, 575 (2009)*; *Charity v. Commonwealth, 49 Va. App. 581, 586–87, 643 S.E.2d 503, 505–06 (2007); Combs v. Commonwealth, 30 Va. App. 778, 787–89, 520 S.E.2d 388, 392–93 (1999); Moore v. Commonwealth, 25 Va. App. 277, 287–89, 487 S.E.2d 864, 869–70 (1997); McQuinn v. Commonwealth, 19 Va. App. 418, 424–25, 451 S.E.2d 704, 707–08 (1994).*

PRACTICE COMMENTARY: The fact that there is no actual conversation between the conspirators is not dispositive, because a conspiracy may be inferred from their actions alone. *James, 53 Va. App. at 678, 674 S.E.2d at 575*; *Charity, 49 Va. App. at 586, 643 S.E.2d at 505–06.*

> "It is a rare case where any 'formal agreement among alleged conspirators' can be established." Because "most conspiracies are 'clandestine in nature,' " conspiracy law does not require proof of an "explicit agreement." A conspiratorial agreement "often may only be established by circumstantial and indirect evidence including the overt actions of the parties."

Johnson, 58 Va. App. at 636, 712 S.E.2d at 756–57.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

Instruction No. 14.200

Completion of Crime Not Necessary

It is not necessary that the defendant commit (name of crime) **or attempt to commit** (name of crime) **to be guilty of the crime of conspiracy.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Velez-*Suarez v. Commonwealth, 64 Va. App. 269, 278, 767 S.E.2d 715, 719–20 (2015);James v. Commonwealth, 53 Va. App. 671, 678–79, 674 S.E.2d 571, 575 (2009)*; *Anderson v. Commonwealth, 52 Va. App. 501, 509, 664 S.E.2d 514, 518 (2008)*; *Charity v. Commonwealth, 49 Va. App. 581, 586, 643 S.E.2d 503, 505 (2007); Cartwright v. Commonwealth, 223 Va. 368, 372, 288 S.E.2d 491, 493–94 (1982); Smith v. Commonwealth, 212 Va. 662, 662–63, 187 S.E.2d 205, 205–06 (1972); Falden v. Commonwealth, 167 Va. 542, 544, 189 S.E. 326, 327 (1937).*

PRACTICE COMMENTARY: See the Scope Note and the Sources & Authority statement for Instruction No. 14.100 for a general discussion of the important cases.

In *Cartwright*, the Court held that a single agreement to commit three crimes can form the basis for three violations of Va. Code Ann. § 18.2-22. *223 Va. at 372, 288 S.E.2d at 493–94.*

A conspiracy only requires proof of an agreement to commit a crime, not an act in furtherance of that crime. *Velez-Suarez, 64 Va. App. at 278, 767 S.E.2d 715 at 719–20.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8)

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

Instruction No. 14.220

Two-Party Minimum

A conspiracy cannot exist unless criminal intent is shared by at least two people.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Charity v. Commonwealth, 49 Va. App. 581, 586, 643 S.E.2d 503, 505 (2007); Johnson v. Commonwealth, 42 Va. App. 46, 57, 590 S.E.2d 75, 78–81 (2003); Gray v. Commonwealth, 260 Va. 675, 680, 537 S.E.2d 862, 865 (2000); Combs v. Commonwealth, 30 Va. App. 778, 787–89, 520 S.E.2d 388, 392–93 (1999); Feigley v. Commonwealth, 16 Va. App. 717, 722–24, 432 S.E.2d 520, 523–25 (1993); Fortune v. Commonwealth, 12 Va. App. 643, 647–50, 406 S.E.2d 47, 48–50 (1991); Wright v. Commonwealth, 224 Va. 502, 505, 297 S.E.2d 711, 713 (1982); Reed v. Commonwealth, 213 Va. 593, 594, 194 S.E.2d 746, 747 (1973); Falden v. Commonwealth, 167 Va. 542, 544, 189 S.E. 326, 327 (1937).

PRACTICE COMMENTARY: A common illustration of the principle embodied in the instruction occurs when the defendant agrees to commit a crime with a government agent, who is only pretending to enter into the agreement. In such a case, there is no conspiracy because an agent who is performing his duties as a secret informer cannot in fact be a conspirator. *Fortune, 12 Va. App. at 647–50, 406 S.E.2d at 48–50.*

A conspiracy to distribute drugs may be shown by a series of drug transactions where one person sells drugs to a buyer who then resells them to a third party. See *Zuniga v. Commonwealth, 7 Va. App. 523, 527–32, 375 S.E.2d 381, 384–87 (1988).*

PRACTICE POINTER:

For a discussion of how to determine when a drug sale shows a drug conspiracy, see Edwards *v. Commonwealth, 18 Va. App. 45, 47–49, 441 S.E.2d 351, 353–54 (1994)*; *Hudak v. Commonwealth, 19 Va. App. 260, 262–64, 450 S.E.2d 769, 770–72 (1994).*

ALERTS:

• As a general rule, a two-party drug sale, standing alone, does not constitute a conspiracy to distribute drugs because the transaction lacks the essential element of an agreement to commit a subsequent distribution offense together. *Feigley, 16 Va. App. at 722–24, 432 S.E.2d at 523–25.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

Instruction No. 14.260

Withdrawal or Change of Mind

Withdrawal from the agreement or change of mind is not a defense to the crime of conspiracy.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Gray v. Commonwealth, 260 Va. 675, 682, 537 S.E.2d 862, 866 (2000).

PRACTICE COMMENTARY: The Virginia rule is that withdrawal from a conspiracy does not constitute an affirmative defense to the charge of conspiracy.

The common law does recognize the defense of withdrawal with regard to subsequent, substantive crimes committed by other conspirators. This principle is consistent with the general approach taken by the Virginia courts, which stress that the agreement is the key element of the crime. See Sources & Authority statement for Instruction No. 14.200. In Virginia, once the defendant has entered into an unlawful agreement, he has done all that is necessary to commit the crime of conspiracy, provided that the agreement was to commit a felony and the criminal intent was shared with at least one other person. *Gray, 260 Va. at 682, 537 S.E.2d at 866*. Similarly, once the defendant has withdrawn from the agreement, he no longer possesses the requisite criminal intent. Thus, while he can be prosecuted for entering into the original agreement, his withdrawal should prevent him from being liable for any criminal acts that are committed at a time when he is no longer a member of the conspiracy.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

Instruction No. 14.500

Conspiracy to Rig a Government Bid

The defendant is charged with the crime of conspiracy to rig a government bid. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant and one or more other persons intentionally entered into an agreement** [to rig; to alter; to manipulate] **a bid; and**

(2) **That the bid was submitted to** [the Commonwealth of Virginia; (name of governmental unit of Commonwealth of Virginia)]; **and**

(3) **That the bid was for the purpose** [of allocating purchases or sales to or among persons; of raising or otherwise fixing the prices of the goods or services; of excluding other persons from dealing with [the Commonwealth; (name of governmental unit of Commonwealth)]].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P14.500

Conspiracy to Rig a Government Bid

You have found the defendant guilty of the crime of conspiracy to rig a government bid.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 59.1-68.7.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: "Person" means any individual, firm, partnership or corporation; "governmental units" means all state agencies and all political subdivisions or agencies thereof; "bid" means any submission of a price, whether written or oral, for any goods, services or construction to be provided. Va. Code Ann. § 59.1-68.6.

A model instruction defining the above terms is not included since the statutory definitions, as set out, appear to embody the common and ordinary meaning of the terms. A definition instruction may be crafted from that language, however, if needed in a particular case.

☞ ***PRACTICE POINTER:***

While the Attorney General of Virginia, with respect to Commonwealth agencies only, has concurrent power and authority to investigate and prosecute any violation of Va. Code Ann. § 59.1-68.7, the Commonwealth's Attorneys retain the power and authority to prosecute any and all violations of Va. Code Ann. § 59.1-68.7 occurring within their respective jurisdictions. Va. Code Ann. § 59.1-68.8.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Conspiracy"

John L. Costello, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 17.1–17.8

MICHIE'S JURISPRUDENCE, Conspiracy §§ 1–11

CHAPTER 15

CONTEMPT

Scope Note

Instruction No. 15.100 Contempt of Court—General

Instruction No. P15.100 Contempt of Court—General

Instruction No. P15.200 Contempt of Court—Penalty

SCOPE NOTE

The power to punish for contempt is an inherent power of the courts; it is a power of self-defense and self-preservation. *Yoder v. Commonwealth, 107 Va. 823, 828–29, 57 S.E. 581, 583 (1907)*. However, the exercise of this power "is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Scialdone v. Commonwealth, 279 Va. 422, 442, 689 S.E.2d 716, 727 (2010)*; *Cooke v. United States, 267 U.S. 517, 539, 45 S. Ct. 390, 69 L. Ed. 767 (1925)*. "The limits of the power to punish for contempt are the least possible power adequate to the end proposed." *Scialdone, 279 Va. at 442, 689 S.E.2d at 727*; *Harris v. United States, 382 U.S. 162, 165, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965)*.

The Constitution of Virginia provides that the "General Assembly may regulate the exercise by courts of the right to punish for contempt." Va. Const. Art. IV, § 14. The General Assembly has enacted five principal regulatory statutes regarding contempt: Va. Code Ann. §§ 18.2-456, 18.2-457, 18.2-458, 18.2-459 and 19.2-11. Va. Code Ann. § 18.2-456 delineates six subdivisions under which courts may punish summarily for contempt, and requires a judge to indicate in writing under which subdivision a person is being charged and punished for contempt. The word "summarily" refers not to the time the adjudication of contempt must be made, but instead to the procedure that dispenses with any further proof or examination and a formal hearing. *Higginbotham v. Commonwealth, 206 Va. 291, 294, 142 S.E.2d 746, 749 (1965)*. While Va. Code Ann. §§ 18.2-456 and 18.2-457 limit the use of summary proceedings and the sentences imposed during those proceedings, these statutes do not govern "plenary hearings for contempt conducted on the basis of a rule to show cause or other more formal attachment." *Robinson v. Commonwealth, 41 Va. App. 137, 146 n.7, 583 S.E.2d 60, 64 n.7 (2003)*. Va. Code Ann. § 18.2-457 requires a jury trial to impose a fine exceeding $250, or imprisonment of more than ten days, for misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice. Va. Code Ann. § 18.2-458 regulates the power of district court judges to punish contempt, and Va. Code Ann. § 18.2-459 addresses appeals from the district court to the circuit court for a contempt sentence. Va. Code Ann. § 19.2-11 controls certain other aspects of contempt procedure.

Bloom v. Illinois, 391 U.S. 194, 196–99 (1968), established a federal due process right to trial by jury in criminal contempt cases if the penalty imposed defines the contempt as a serious crime. A contempt sentence exceeding an aggregate of six months, without regard to the number of individual sentences, is serious and requires a jury trial. *Codispoti v. Pennsylvania, 418 U.S. 506, 511–18 (1974)*; *Taylor v. Hayes, 418 U.S. 488, 497–98 (1974)*. The effect of a monetary penalty is less clear. *International Union, UMWA v. Bagwell, 512 U.S. 821, 836–38 (1994)*. Until 1984, federal law defined a petty offense as one punishable by no more than six months' imprisonment, a fine of $500, or both. This definition was transported into contempt cases. *Greene v. Tucker, 375 F. Supp. 892, 898–99 (E.D. Va. 1974)*. Federal law now defines a petty offense as one that, as to an individual, is punishable by a fine of not more than $5,000. 18 U.S.C. § 19; 18 U.S.C. § 3571(b)(6) and (7).

A district court judge has the same power and jurisdiction as a circuit court judge to impose penalties for contemptuous conduct, and they may adjudicate both civil and criminal contempt. Va. Code Ann. § 16.1-69.24; *Gilman v. Commonwealth, 275 Va. 222, 227, 657 S.E.2d 474, 476 (2008)*; *Hackler v. Hackler, 44 Va. App. 51, 69, 602 S.E.2d 426, 435 (2004)*. Any person charged with a felony offense, misdemeanor offense, or released on a summons pursuant to Va. Code Ann. §§ 19.2-73 or 19.2-74, who fails to appear, may be punished under subdivision A(6) of Va.

Code Ann. § 18.2-456, but shall not be punished for contempt under Va. Code Ann. § 16.1-69.24. Civil contempt proceedings are coercive or remedial in nature. Criminal contempt proceedings are punitive; the penalty is fixed and designed to punish a past event. *Local 333B, United Marine Div. of Int'l Longshoremen's Ass'n v. Commonwealth ex rel. Virginia Ferry Corp., 193 Va. 773, 779–80, 71 S.E.2d 159, 163 (1952).* See also *Bagwell, 512 U.S. at 827–28.* A criminal contempt may be direct, or indirect (constructive). *Scialdone, 279 Va. at 442, 689 S.E.2d at 727*; *Robinson, 41 Va. App. at 145–46, 583 S.E.2d at 64*; *Burdett v. Commonwealth, 103 Va. 838, 845–46, 48 S.E. 878, 880–81 (1904).*

Va. Code Ann. § 19.2-271, which provides in pertinent part that "[n]o judge shall be competent to testify in any criminal or civil proceeding as to any matter which came before him in the course of his official duties," is not limited to testimony about matters occurring in the courtroom, only to matters that came before the judge while acting in his or her official capacity. *Epps v. Commonwealth, 47 Va. App. 687, 704–05, 626 S.E.2d 912, 920 (2006)* (en banc), *aff'd on other grounds, 273 Va. 410, 414–15, 641 S.E.2d 77, 79–80 (2007).*

Direct Contempt:

Generally, a direct contempt is one committed in the presence of and observed by the court. *Gilman, 275 Va. at 227, 657 S.E.2d at 476*; *Scialdone, 279 Va. at 442, 689 S.E.2d at 727* (noting that the power to punish summarily covers "only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court [and] are actually observed by the court"). Contempt committed in the presence of, but not observed by, the court is treated as an indirect contempt. *Johnson v. Mississippi, 403 U.S. 212, 215 (1971).* Va. Code Ann. § 18.2-456 includes a list of contemptuous acts that may be summarily adjudicated and punished. "Summarily" in Va. Code Ann. § 18.2-456 does not refer to the time of adjudication or sentencing; rather, it refers to the permissible procedure. The term means that the court may adjudicate the contempt without additional proof or hearing. *Higginbotham, 206 Va. at 294, 142 S.E.2d at 749.*

A direct, observed contempt within Va. Code Ann. § 18.2-456 can be immediately adjudicated and punished by the court. *Scialdone, 279 Va. at 442–43, 689 S.E.2d at 727*; *Gilman, 275 Va. at 227–28, 657 S.E.2d at 476*; *Taylor, 418 U.S. at 497–98.* Alternatively, a direct, observed contempt within a subdivision of Va. Code Ann. § 18.2-456 can be immediately adjudicated by the court, but imposition of punishment deferred. *Taylor, 418 U.S. at 497–98.* A fine may not be imposed for contempt unless the contemnor is present in the court, or has been served with a rule to show cause. Va. Code Ann. § 19.2-11. See generally *Higginbotham, 206 Va. at 295–96, 142 S.E.2d at 749–50.* The proceeding may still be summary; no additional evidence of the contempt is necessary.

There are two exceptions to the general rule that contempt proceedings are non-jury. First, Va. Code Ann. § 18.2-457 requires that a jury be impaneled to impose any penalty exceeding a fine of $250 or imprisonment for ten (10) days if the contempt is within Va. Code Ann. § 18.2-456(1). *Brown v. Commonwealth, 26 Va. App. 758, 762–63, 497 S.E.2d 147, 150 (1998)* (reducing summarily imposed fine of $400 in non-jury contempt proceedings under Va. Code Ann. § 18.2-456(1) to statutory limit of $50 and holding $350 remainder of such fine invalid due to lack of jury involvement). Thus, in a Va. Code Ann. § 18.2-456(1) case in which a penalty exceeding a fine of $250 or ten (10) days imprisonment is anticipated, the court has two options. It can immediately and summarily adjudicate the contempt and defer imposition of sentence until a jury can be impaneled. Alternatively, the court can defer the contempt proceeding, give notice, hold a summary hearing, adjudicate the contempt and impanel a jury to determine

sentence. Either alternative requires that the jury be instructed on penalty; Instruction Nos. P15.100 or P15.200 should be used.

Second, a direct contempt must be tried to a jury if the anticipated penalty exceeds a fine of $500 or imprisonment for six months. See *Bloom, 391 U.S. at 196–99*; *Greene, 375 F. Supp. at 898–99*. In such a case, the jury adjudicates the contempt. Instruction No. P15.100 should be used.

Indirect Contempt:

An indirect contempt is one not committed in the presence of the court, or one committed in the presence of the court but not observed by the court. *Scialdone, 279 Va. at 443, 689 S.E.2d at 727*; *Gilman, 275 Va. at 227, 657 S.E.2d at 476; Johnson, 403 U.S. at 215*. In cases of indirect contempt, a plenary hearing, after notice, must be held to adjudicate the contempt. *Davis v. Commonwealth, 219 Va. 395, 397–98, 247 S.E.2d 681, 682–83 (1978)*; *Cooke, 267 U.S. at 537.*

If a penalty exceeding a fine of $500 or imprisonment for six months is anticipated, a jury must be impaneled to adjudicate the contempt. *Bloom, 391 U.S. at 196–99*; *Greene, 375 F. Supp. at 898–99*. Instruction No. P15.100 should be used. The penalty, however, is imposed by the court.

In all other cases of indirect contempt, except one, the court may adjudicate the contempt and impose a penalty not exceeding a fine of $500 or imprisonment for six months. The exception is found in Va. Code Ann. § 18.2-457. An indirect contempt within Va. Code Ann. § 18.2-456(1) (i.e., one outside the court's presence but "so near thereto as to obstruct or interrupt the administration of justice") can be adjudicated by the court, after notice and plenary hearing, but the court cannot impose a penalty exceeding a fine of $250 and imprisonment for ten (10) days. If a penalty in excess of $250 or ten (10) days is anticipated, the court, after adjudicating the contempt, must impanel a jury to fix the penalty. Instruction Nos. P15.100 or P15.200 should be used.

Written finding:

When a court is making the contempt finding, Va. Code Ann. § 18.2-456(B) provides that "[t]he judge shall indicate, in writing, under which subdivision . . . a person is being charged and punished for contempt."

Penalty:

Statutes in particular subject areas should be consulted for any applicable maximum punishment for particular forms of contempt. For example, Va. Code Ann. § 16.1-292(B) limits possible imprisonment to twelve (12) months for contempt for refusing to comply with spousal or child support orders. Where there is a specific statutory maximum penalty, Instruction No. P15.200 should be used.

Appeals:

Va. Code Ann. §§ 16.1-69.24, 18.2-459, and 19.2-318 authorize appeals for contempt. An appeal from a district court is tried on the district judge's certificate of the conviction and the offense's circumstances, along with any testimony. This procedure differs from a de novo appeal. See *Gilman, 275 Va. at 230–31, 657 S.E.2d at 478*. Note that a trial court's *refusal* to make a finding of contempt is not appealable. *Monds v. Monds, 68 Va. App. 674, 684, 813 S.E.2d 1, 5 (2018).*

Instruction No. 15.100

Contempt of Court—General

The defendant is charged with contempt of court. Contempt of court is an act in disrespect of the court or its process, or an act that tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is disobedience of any lawful command of the court, or conduct that despises or scorns the authority, justice, or dignity of the court. The Commonwealth must prove beyond a reasonable doubt that the defendant intentionally, willfully, or recklessly acted in such a manner as to constitute contempt.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant intentionally acted in such a manner as to constitute contempt of court, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant intentionally acted in such a manner as to constitute contempt of court, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 16.1-69.24, 18.2-456, 18.2-457, 19.2-11.

CASE AUTHORITY:

Becker v. Commonwealth, 64 Va. App. 481, 490–91, 769 S.E.2d 683, 687–88 (2015); *Parham v. Commonwealth, 60 Va. App. 450, 455–62, 729 S.E.2d 734, 736–39 (2012)*; *Scialdone v. Commonwealth, 279 Va. 422, 442–45, 689 S.E.2d 716, 727–28 (2010)*; *Singleton v. Commonwealth, 278 Va. 542, 548–50, 685 S.E.2d 668, 672–73 (2009)*; *Nusbaum v. Berlin, 273 Va. 385, 407–09, 641 S.E.2d 494, 506–07 (2007)*; *Robinson v. Commonwealth, 41 Va. App. 137, 142–43, 583 S.E.2d 60, 63 (2003)*; *Brown v. Commonwealth, 26 Va. App. 758, 762, 497 S.E.2d 147, 149 (1998)*; *International Union, UMWA v. Bagwell, 512 U.S. 821, 833–34 (1994)*; *Bloom v. Illinois, 391 U.S. 194, 198 (1968)*; *Holt v. Virginia, 381 U.S. 131, 136 (1965)*; *Local 333B, United Marine Div. of Int'l Longshoremen's Ass'n v. Commonwealth ex rel. Virginia Ferry Corp., 193 Va. 773, 784–85, 71 S.E.2d 159, 166 (1952)*; *Burdett v. Commonwealth, 103 Va. 838, 842–43, 48 S.E. 878, 879–80 (1904)*.

PRACTICE COMMENTARY:

Intent requirement. A contempt conviction will not be upheld unless there was sufficient evidence from which to conclude that the defendant acted intentionally, willfully, or recklessly in committing the contumacious conduct. *Carter v. Commonwealth, 2 Va. App. 392, 397, 399, 345 S.E.2d 5, 8–9 (1986)*; *Harvey v. Commonwealth, 209 Va. 433, 436, 164 S.E.2d 636, 638 (1968)*. Contempt, however, is not a specific intent crime. *Abdo v. Commonwealth, 64 Va. App. 468, 476, 769 S.E.2d 677, 680 (2015)*.

Contempt for disobedience of a court order—Notice or knowledge required. A litigant cannot be held in contempt of court for violating the terms of a court order unless the alleged contemnor had notice or knowledge of the terms of the order. *Zedan v. Westheim, 60 Va. App. 556, 574, 729 S.E.2d 785, 794 (2012)*; *Calamos v. Commonwealth, 184 Va. 397, 406, 35 S.E.2d 397, 400 (1945)*. However, there is an exception to this notice requirement when a decree of injunction operates *in rem* against an illegal use of specific real property. *Calamos, 184 Va. at 403–04, 35 S.E.2d at 399* (stating that the exception is based on the theory that "the injunction decree is an encumbrance which runs with the land, of which everybody must take notice").

Inability to comply is a defense to contempt. Unless it can be shown that the alleged contemnor had the ability to tender obedience to an order of court, or intentionally took steps to make himself or herself unable to comply, a contempt charge is not sustainable. *Barnhill v. Brooks, 15 Va. App. 696, 704–05, 427 S.E.2d 209, 215 (1993)*; *Laing v. Commonwealth, 205 Va. 511, 514–15, 137 S.E.2d 896, 899 (1964)*.

Statutes of limitations not a defense to contempt. As contempt proceedings are

not criminal prosecutions, the statutes of limitations applicable to crimes do not apply to bar them. *Porter v. Commonwealth, 65 Va. App. 467, 477, 778 S.E.2d 549, 553–54 (2015).*

Order must be definite. In instances where a court order does not explicitly direct, mandate, or prohibit specific conduct, it is insufficient to sustain a finding of contempt. *Petrosinelli v. PETA, Inc., 273 Va. 700, 707, 643 S.E.2d 151, 154–55 (2007)*; *Mardula v. Mendelson, 34 Va. App. 120, 128, 538 S.E.2d 338, 342 (2000)*; *Michaels v. Commonwealth, 32 Va. App. 601, 609–10, 529 S.E.2d 822, 826 (2000)*; *Commonwealth ex rel. Graham v. Bazemore, 32 Va. App. 451, 455–56, 528 S.E.2d 193, 195 (2000)*; *Wilson v. Collins, 27 Va. App. 411, 424–25, 499 S.E.2d 560, 566–67 (1998)*; *Winn v. Winn, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977)*; *French v. Pobst, 203 Va. 704, 710, 127 S.E.2d 137, 141–42 (1962).*

Void orders. Disobedience of a void order is not contempt. *Mardula, 34 Va. App. at 125–26, 538 S.E.2d at 341*; *Laing, 205 Va. at 513, 137 S.E.2d at 898*; *Robertson v. Commonwealth, 181 Va. 520, 536, 25 S.E.2d 352, 358 (1943).*

Self-incrimination bar. In view of the constitutional provisions, both State and Federal, that no one shall be compelled to furnish evidence against himself or herself, a witness cannot be punished for contempt for refusing to answer questions when such answers would incriminate himself or herself. *McCready v. Commonwealth, 212 Va. 540, 541–42, 186 S.E.2d 88, 89–90 (1972).* See also *Counselman v. Hitchcock, 142 U.S. 547, 561–86 (1892)*; *Cullen v. Commonwealth, 65 Va. (24 Gratt.) 624, 638 (1873).*

☞ ***PRACTICE POINTER:***

Where counsel scheduled multiple cases in different jurisdictions at the same time, the evidence was sufficient for conviction for "contempt." *Robinson, 41 Va. App. at 142–43, 583 S.E.2d at 63; Brown, 26 Va. App. at 762, 497 S.E.2d at 149.*

A telephone call from the court to the defendant's attorney asking that the defendant appear in court the next morning at a specified time, without other rule or process, constituted insufficient notice that the court was going to hold a contempt hearing. *Davis v. Commonwealth, 219 Va. 395, 247 S.E.2d 681 (1978).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering With Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 26.1–26.5

MICHIE'S JURISPRUDENCE, Contempt §§ 1–38

Instruction No. P15.100

Contempt of Court—General

The defendant has been found in contempt of court for misbehavior in the presence of the court. Specifically, the defendant intentionally or willfully or recklessly (insert specifics of contempt)**. You shall fix his punishment. The punishment shall be a fine of a fixed amount not more than $500 or it shall be a fixed period of imprisonment not more than six (6) months.**

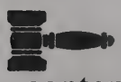
SOURCES & AUTHORITY

GOVERNING STATUTES:

None.

CASE AUTHORITY:

Brown v. Commonwealth, 26 Va. App. 758, 762, 497 S.E.2d 147, 149–50 (1998); Powell v. Ward, 15 Va. App. 553, 557–58, 425 S.E.2d 539, 542 (1993); Greene v. Tucker, 375 F. Supp. 892, 899–901 (E.D. Va. 1974); Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966).



PRACTICE COMMENTARY: This instruction applies only when the contempt is one within Va. Code Ann. § 18.2-456(1) and the court anticipates a penalty greater than a $250 fine or ten (10) days imprisonment, but not greater than a $500 fine or six (6) months imprisonment. Va. Code Ann. § 18.2-457.

ALERTS:

• If a penalty exceeds the latter limits, a jury must be impaneled to adjudicate the contempt. The appropriate instructions in that situation are Instruction Nos. 15.100 and P15.200.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering With Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 26.1–26.5

MICHIE'S JURISPRUDENCE, Contempt §§ 1–38

Instruction No. P15.200

Contempt of Court—Penalty

You have found the defendant guilty of contempt.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) **Confinement in jail for a specific time, but not more than** (specify applicable period)**; or**

(2) **A fine of a specific amount, but not more than** (specify applicable amount)**; or**

(3) **Confinement in jail for a specific time, but not more than** (specify applicable period)**, and a fine of a specific amount, but not more than** (specify applicable amount).

SOURCES & AUTHORITY

GOVERNING STATUTES:

None.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This instruction applies only where the trial court has impaneled a jury to adjudicate a contempt charge, and the jury has found that contempt was committed.

Varying Statutes. Statutes in particular subject areas should be consulted for any applicable maximum punishments set by the legislature for particular forms of contempt. For example, Va. Code Ann. § 16.1-292(B) authorizes imprisonment for a term of no more than twelve (12) months for contempt in refusing to comply with spousal or child support orders.

Constitutional Considerations. In the absence of a specific statutory limit, the only apparent restriction on a contempt punishment is that it cannot violate the constitutional prohibitions against "cruel and unusual punishment" and "excessive fines" contained within the Eighth Amendment. See *Spallone v. United States, 487 U.S. 1251, 1257 (1988)* (Marshall, J., dissenting from the denial of a stay) (explaining that "the Cruel and Unusual Punishment Clause [of the Eighth Amendment], like the Excessive Fines Clause, applies to punishments for past conduct" such as criminal contempt). See also *Green v. United States, 356 U.S. 165, 200 (1958)* (Black, J. dissenting) (criticizing majority's holding that "reasonableness" is a workable limit on contempt punishment, explaining that "as the law now stands there are no limits on the punishment a judge can impose on a defendant whom he finds guilty of contempt except for whatever remote restrictions exist in the Eighth Amendment's prohibition against cruel and unusual punishments").

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering With Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 26.1–26.5

MICHIE'S JURISPRUDENCE, Contempt §§ 1–38

CHAPTER 16

CREDIT CARD OFFENSES

Scope Note

Instruction No. 16.100 Credit Card Theft—General

Instruction No. P16.100 Credit Card Theft—General

Instruction No. 16.200 Credit Card Forgery

Instruction No. P16.200 Credit Card Forgery

Instruction No. 16.300 Credit Card Fraud—Intent to Use, Sell or Transfer

Instruction No. P16.300(a) Credit Card Fraud—Intent to Use, Sell or Transfer (Felony)

Instruction No. P16.300(b) Credit Card Fraud—Intent to Use, Sell or Transfer (Misdemeanor)

Instruction No. 16.305 Credit Card Fraud—Expired or Revoked Card or Number

Instruction No. P16.305(a) Credit Card Fraud—Expired or Revoked Card or Number (Felony)

Instruction No. P16.305(b) Credit Card Fraud—Expired or Revoked Card or Number (Misdemeanor)

Instruction No. 16.310 Credit Card Fraud—False Representation

Instruction No. P16.310(a) Credit Card Fraud—False Representation (Felony)

Instruction No. P16.310(b) Credit Card Fraud—False Representation (Misdemeanor)

Instruction No. 16.320 Credit Card Fraud—Obtaining Cash Advance

Instruction No. P16.320(a) Credit Card Fraud—Obtaining Cash Advance (Felony)

Instruction No. P16.320(b) Credit Card Fraud—Obtaining Cash Advance (Misdemeanor)

SCOPE NOTE

Va. Code Ann. § 18.2-192(2) provides that credit card or credit card number theft is grand larceny and is punishable as provided in the larceny statute, Va. Code Ann. § 18.2-95.

Instruction No. 16.100 is a general instruction on credit card theft.

Instruction No. 16.200 addresses credit card forgery. See also the forgery instructions in Chapter 30.

Instruction Nos. 16.300, 16.305, 16.310, and 16.320 are based upon Va. Code Ann. § 18.2-195(1) and address different forms of credit card fraud. Special note should be taken of the Practice Commentary and Alerts appearing in the Sources & Authority to each instruction.

Venue for credit card offenses is set forth in Va. Code Ann. § 18.2-198.1.

Instruction No. 16.100

Credit Card Theft—General

The defendant is charged with the crime of credit card theft. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [took; obtained; withheld] **a** [credit card; credit card number] **from the** [person; possession; custody; control] **of** (name of person); **and**

[(1) That the defendant received a [credit card; credit card number] from another knowing that it had been [taken; obtained; withheld] from the [person; possession; custody; control] of (name of person); and]

[(1) That the defendant received a [credit card; credit card number] knowing the same to have been [lost; mislaid; delivered under a mistake as to the [identity; address] of the cardholder] and retained possession;

(2) That the [taking; obtaining; withholding; receiving] **was without the consent of the cardholder; and**

(3) That the [taking; obtaining; withholding; receiving] **was with intent** [to use it; to sell it; to transfer it to a person other than the issuer or the cardholder].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Note:

The instruction includes three different versions of Element (1). Only the one fitting the facts of the case should be used.

Instruction No. P16.100

Credit Card Theft—General

You have found the defendant guilty of the crime of credit card theft.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

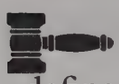
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-192.

CASE AUTHORITY:

Bryant v. Commonwealth, 70 Va. App. 697, 709–11, 832 S.E.2d 48, 54–55 (2019); Scott v. Commonwealth, 292 Va. 380, 385, 789 S.E.2d 608, 610 (2016); Meeks v. Commonwealth, 274 Va. 798, 803, 651 S.E.2d 637, 640 (2007); Scott v. Commonwealth, 36 Va. App. 276, 280–82, 549 S.E.2d 624, 626 (2001); Harrison v. Commonwealth, 32 Va. App. 525, 529–32, 529 S.E.2d 330, 332–33 (2000); Sykes v. Commonwealth, 27 Va. App. 77, 79–81, 497 S.E.2d 511, 512–13 (1998); Bunn v. Commonwealth, 21 Va. App. 593, 600–01, 466 S.E.2d 744, 747–48 (1996); Sandoval v. Commonwealth, 20 Va. App. 133, 135–37, 455 S.E.2d 730, 731–32 (1995); Wilder v. Commonwealth, 217 Va. 145, 146–48, 225 S.E.2d 411, 412–13 (1976); Cheatham v. Commonwealth, 215 Va. 286, 288–90, 208 S.E.2d 760, 762–63 (1974).



PRACTICE COMMENTARY: This Instruction covers only the offenses defined in subsections (a) and (b) of Va. Code Ann. § 18.2-192(1). Additional credit card theft offenses are defined in subsections (c) and (d) of Va. Code Ann. § 18.2-192(1).

While unexplained, exclusive possession of recently stolen goods creates an inference that the possessor was the thief in a larceny prosecution (see Instruction No. 36.300), this does not hold true in the case of credit card theft. The court stated in *Cheatham, 215 Va. at 289, 208 S.E.2d at 763*, that it was unwilling to extend the inference of guilt from unexplained possession of recently stolen goods to the "withholding" of a credit card. But see *Sandoval, 20 Va. App. at 135–137, 455 S.E.2d at 731–732*, where the court appeared to permit such an inference when other property taken in the same theft was found in possession of the defendant.

In *Wilder, 217 Va. at 147–48, 225 S.E.2d at 413*, the court held that an indictment alleging mere possession of a stolen credit card was not sufficient to state the offense of credit card theft.

Retention is not an element of credit card theft. Credit card theft is completed where the card or number is unlawfully taken from its rightful owner or is received with knowledge that it has been taken and with the intent to use it, sell it, or transfer it. *Meeks, 274 Va. at 803, 651 S.E.2d at 640* (overruling *Cheatham* on this point).

In accordance with Va. Code Ann. § 18.2-194, when a person, other than the cardholder or a person authorized by the cardholder, possesses two or more credit cards which are signed or two or more credit card numbers, such possession shall be prima facie evidence that said cards or credit card numbers were obtained in violation of Va. Code Ann. § 18.2-192.

The single larceny doctrine does not apply to multiple offenses charged under Va. Code Ann. § 18.2-192. Accordingly, the taking of each card, coupled with intent to deprive the owner of possession and intent to use, sell or transfer the card,

constitutes a separate statutory offense for which the defendant may be convicted and punished. *Scott, 36 Va. App. at 280–82, 549 S.E.2d at 626.*

Credit card theft involves the "improper acquisition, possession, and distribution of credit cards" but not the subsequent misuse of a lawfully possessed card. Thus, the misuse of a university's motor vehicle fleet fuel card by an authorized cardholder is not credit card theft in violation of Va. Code Ann. § 18.2-192. *Sykes, 27 Va. App. at 79–81, 497 S.E.2d at 512–513.* See also *Saponaro v. Commonwealth, 51 Va. App. 149, 151, 655 S.E.2d 49, 50 (2008)*; *Kovalaske v. Commonwealth, 56 Va. App. 224, 232, 692 S.E.2d 641, 646 (2010).*

In a credit card theft case, a victim's declaration of unauthorized use or related report to the bank or card issuer may be admissible if it is non-testimonial for purposes of the Confrontation Clause. *Anaman v. Commonwealth, 64 Va. App. 379, 390–94, 768 S.E.2d 700, 706–07 (2015).*

Va. Code Ann. § 18.2-192(1)(a) encompasses two distinct offenses. The first prong proscribes the taking, obtaining or withholding a credit card without the cardholder's consent. The second prong proscribes receiving a stolen credit card, knowing it to have been stolen, with the intent to use it, sell it, or transfer it to another unauthorized person. The credit card theft under the first prong of Va. Code Ann. § 18.2-192(1)(a) is a general intent crime completed upon an unlawful taking. It does not require that the Commonwealth allege or prove the specific intent required to support a conviction under the second prong of the statute. *Meeks, 274 Va. at 803, 651 S.E.2d at 639–40*; *Scott, 292 Va. at 384–85, 789 S.E.2d at 610.*

ALERTS:

• For a broad venue provision specific to this section, see Va. Code Ann. § 18.2-198.1.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1–16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

Instruction No. 16.200

Credit Card Forgery

The defendant is charged with the crime of credit card forgery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant forged** [a paper; an electronic] **form evidencing a purchase of** [goods; services; something of value] **from a merchant through the use of a credit card; and**

(2) **That the defendant was not** [the cardholder; a person authorized by him to execute that form]**; and**

(3) **That the defendant intended to defraud the issuer.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P16.200

Credit Card Forgery

You have found the defendant guilty of the crime of credit card forgery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-193, 18.2-191.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-191 defines "sales draft." Instead of using that term and a separate instruction defining it, the model instruction incorporates the statutory definition.

Va. Code Ann. § 18.2-193 contains five categories of credit card forgery. This instruction addresses one subcategory under § 18.2-193(c). This instruction must be modified if the defendant is charged with credit card forgery under of any the other categories.

For a discussion of relevant cases and principles applicable to this Instruction, see the Sources & Authority statement for Instruction No. 16.100.

ALERTS:

• Va. Code Ann. 18.2-193 is much broader than the instruction not only as to the nature of the act but also as to the designation of the person defrauded.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1–16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

Instruction No. 16.300

Credit Card Fraud—Intent to Use, Sell or Transfer

The defendant is charged with the crime of credit card fraud. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [took; obtained; withheld] **a** [credit card; credit card number] **from the** [person; possession; custody; control] **of** (name of person); **and**

[(1) That the defendant received a [credit card; credit card number] from another knowing that it had been [taken; obtained; withheld] from the [person; possession; custody; control] of (name of person); and]

[(1) That the defendant received a [credit card; credit card number] knowing the same to have been [lost; mislaid; delivered under a mistake as to the [identity; address] of the cardholder] and retained possession; and]

(2) That the [taking; obtaining; withholding; receiving; retaining] **was with intent** [to use it; to sell it; to transfer it to a person other than the issuer or the cardholder]; **and**

(3) That the (taking; obtaining; withholding; receiving; retaining) **was without the consent of the cardholder; and**

(4) That the defendant used the [credit card; credit card number] **for the purpose of obtaining money, goods, services or anything else of value; and**

(5) That the defendant used the [credit card; credit card number] **with the intent to defraud any person; and**

(6) That the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of felony credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first five elements of the crime as charged but you do not find beyond a reasonable doubt that the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of misdemeanor credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first five elements of the crime, or that such items were of some value, then you shall find the defendant not guilty.

Note:

The instruction includes three different versions of Element (1). Only the one fitting the facts of the case should be used.

Instruction No. P16.300(a)

Credit Card Fraud—Intent to Use, Sell or Transfer (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Upon consideration of all the evidence you have heard, you shall fix the

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

Instruction No. P16.300(b)

Credit Card Fraud—Intent to Use, Sell or Transfer (Misdemeanor)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-195(1)(a), 18.2-192.

CASE AUTHORITY:

White v. Commonwealth, 68 Va. App. 241, 250–52, 807 S.E.2d 242, 247 (2017); *Kovalaske v. Commonwealth, 56 Va. App. 224, 232, 692 S.E.2d 641, 646 (2010)*; *Saponaro v. Commonwealth, 51 Va. App. 149, 151–53, 655 S.E.2d 49, 50–51 (2008).*

PRACTICE COMMENTARY: Instructions for violations of subsection (2) of Va. Code Ann. § 18.2-195 can be drafted by appropriate modification of subsection (1) instructions.

For a discussion of other relevant cases and principles applicable to this Instruction, see the Sources & Authority statement for Instruction No. 16.100.

ALERTS:

• To constitute felony credit card fraud, the value of all money, goods, services and other things of value fraudulently obtained or furnished in any six (6) month period must exceed $1,000. Va. Code Ann. § 18.2-195(3).

• Misuse of a credit card lawfully possessed is distinct from misuse of a credit card wrongfully in one's possession. The former is not credit card fraud under Va. Code Ann. § 18.2-195(1)(b)(i). *Saponaro, 51 Va. App. at 152, 65 S.E.2d at 51.* See also *White, 68 Va. App. at 252, 807 S.E.2d at 247* (evidence was sufficient to support conviction under Va. Code Ann. § 18.2-195(1)(a) where fact finder could infer that defendant's possession of the debit card when she took it to the ATM was not authorized as part of her employment as a home health care provider); *Kovalaske, 56 Va. App. at 232, 692 S.E.2d at 646.*

• Mere possession of a stolen credit card number in one jurisdiction after use in another is not "[an] act in furtherance of the crime" for purposes of venue for credit card offenses. Va. Code Ann. § 18.2-198.1; *Gheorghiu v. Commonwealth, 280 Va. 678, 687–88, 701 S.E.2d 407, 412–13 (2010).*

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1–16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

Instruction No. 16.305

Credit Card Fraud—Expired or Revoked Card or Number

The defendant is charged with the crime of credit card fraud. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant knew a** [credit card; credit card number] [had expired; had been revoked]; **and**

(2) **That the defendant used the** [credit card; credit card number] **for the purpose of obtaining money, goods, services or anything else of value; and**

(3) **That the defendant used the** [credit card; credit card number] **with the intent to defraud any person; and**

(4) **That the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of felony credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime, but you do not find beyond a reasonable doubt that the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of misdemeanor credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any of the first three elements of the crime, or that such items were of some value, then you shall find the defendant not guilty.

Instruction No. P16.305(a)

Credit Card Fraud—Expired or Revoked Card or Number (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P16.305(b)

Credit Card Fraud—Expired or Revoked Card or Number (Misdemeanor)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-195(1)(a), 18.2-192.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Instructions for violations of subsection (2) of Va. Code Ann. § 18.2-195 can be drafted by appropriate modification of subsection (1) instructions.

For a discussion of relevant cases and principles applicable to this Instruction, see the Sources & Authority statement for Instruction No. 16.100.

ALERTS:

• To constitute felony credit card fraud, the value of all money, goods, services and other things of value fraudulently obtained or furnished in any six (6) month period must exceed $1,000. Va. Code Ann. § 18.2-195(3).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1–16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

Instruction No. 16.310

Credit Card Fraud—False Representation

The defendant is charged with the crime of credit card fraud. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant represented that he was the holder of a [credit card; credit card number] (describe issuer, card number, etc.) **issued to** (name of person) **as cardholder; and**

(2) That such representation was without the consent of the cardholder; and

(3) That such representation was made with the intent to defraud any person; and

(4) That by virtue of such representation the defendant obtained money, goods, services or anything else of value; and

(5) That the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of felony credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements of the crime, but you do not find beyond a reasonable doubt that the value of all money, goods, services and other things of value obtained by the defendant in any six (6) month period exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of misdemeanor credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any of the first four elements of the crime, or that such items were of some value, then you shall find the defendant not guilty.

Instruction No. P16.310(a)

Credit Card Fraud—False Representation (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Credit Card Fraud—False Representation (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P16.310(b)

Credit Card Fraud—False Representation (Misdemeanor)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-195(1)(b).

CASE AUTHORITY:

Kovalaske v. Commonwealth, 56 Va. App. 224, 232, 692 S.E.2d 641, 646 (2010); *Saponaro v. Commonwealth, 51 Va. App. 149, 152, 655 S.E.2d 49, 51 (2008).*

PRACTICE COMMENTARY: If the false representation is with respect to a credit card which has never been issued, the instruction must be modified accordingly. See Va. Code Ann. § 18.2-195(1)(b)

Instructions for violations of subsection (2) of Va. Code Ann. § 18.2-195 can be drafted by appropriate modification of subsection (1) instructions.

For a discussion of relevant cases and principles applicable to this Instruction, see the Sources & Authority statement for Instruction No. 16.100.

ALERTS:

• To constitute felony credit card fraud, the value of all money, goods, services and other things of value fraudulently obtained or furnished in any six (6) month period must exceed $1,000. Va. Code Ann. § 18.2-195(3).

• Misuse of a credit card lawfully possessed is distinct from misuse of a credit card wrongfully in one's possession. The former is not credit card fraud under Va. Code Ann. § 18.2-195(1)(b)(i). *Saponaro, 51 Va. App. at 152, 65 S.E.2d at 51.* See also *Kovalaske, 56 Va. App. at 232, 692 S.E.2d at 646.*

• Mere possession of a stolen credit card number in one jurisdiction after use in another is not "[an] act in furtherance of the crime" for purposes of venue for credit card offenses under Va. Code Ann. § 18.2-198.1. See *Gheorghiu v. Commonwealth, 280 Va. 678, 687–88, 701 S.E.2d 407, 412–13 (2010).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1-16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

Instruction No. 16.320

Credit Card Fraud—Obtaining Cash Advance

The defendant is charged with the crime of credit card fraud. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant obtained money from the issuer of a** [credit card; credit card number]; **and**

(2) **That he obtained the money** [by use of an unmanned device of the issuer; through a person other than the issuer]; **and**

(3) **That he knew when he obtained the money that the advance would exceed his available credit and any available balances held by the issuer; and**

(4) **That he obtained the money with the intent to defraud any person; and**

(5) **That the value of all money obtained by the defendant in any six (6) month period exceeded $1,000.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of felony credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements of the crime, but you do not find beyond a reasonable doubt that the value of all money obtained by the defendant in any six (6) month period exceeded $1,000, then you shall find the defendant guilty of misdemeanor credit card fraud, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any of the first four elements of the crime, or that some value was obtained, then you shall find the defendant not guilty.

Instruction No. P16.320(a)

Credit Card Fraud—Obtaining Cash Advance (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Credit Card Fraud—Obtaining Cash Advance (Felony)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12)

Instruction No. P16.320(b)

Credit Card Fraud—Obtaining Cash Advance (Misdemeanor)

You have found the defendant guilty of the crime of credit card fraud.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-195(1)(d).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Instructions for violations of subsection (2) of Va. Code Ann. § 18.2-195 can be drafted by appropriate modification of subsection (1) instructions.

For a discussion of relevant cases and principles applicable to this Instruction, see the Sources & Authority statement for Instruction No. 16.100.

ALERTS:

• To constitute felony credit card fraud, the value of all money, goods, services and other things of value fraudulently obtained or furnished in any six (6) month period must exceed $1,000. Va. Code Ann. § 18.2-195(3).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Credit Card Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 16.1–16.2

MICHIE'S JURISPRUDENCE, Commercial Law § 94; Fraud and Deceit § 71; and Larceny §§ 27, 71

CHAPTER 17

DAMAGE TO REALTY OR PERSONALTY

Scope Note

Instruction No. 17.100 Damage to Realty or Personalty (Felony)

Instruction No. P17.100 Damage to Realty or Personalty (Felony)

SCOPE NOTE

The instructions in this chapter are based on Va. Code Ann. § 18.2-137. Section 18.2-37 criminalizes a number of different acts that have the effect of injuring or interfering with real and personal property, including various monuments and boundary markers.

For hit and run damage, see the Scope Note for Chapter 32.

Instruction No. 17.100
Damage to Realty or Personalty (Felony)

The defendant is charged with the crime of intentionally damaging property. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intentionally** [damaged; destroyed; defaced; removed without the intent to steal; broke down] [property which was not his own; (type of monument, memorial, or tree described in Va. Code Ann. § 18.2-137(A))]**; and**

(2) **That the** [value of; damage to] **the property was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged but has not proved [a value; damage] **of $1,000 or more, you shall find the defendant guilty of misdemeanor damaging property [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant intentionally damaged [destroyed; defaced; removed without the intent to steal; broke down] [property which was not his own] [type of monument, memorial, or tree]**, but that the Commonwealth has proved beyond a reasonable doubt that the defendant has unlawfully done so, then you shall find the defendant guilty of unlawfully damaging property [and you shall fix his punishment at a fine of a specific amount, but not more than $500].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant either intentionally or unlawfully damaged the property, then you shall find the defendant not guilty.

Note:

Element (1) of the instruction provides alternative choices in the first set of brackets for each of the acts proscribed by the statute. The second set of brackets provides alternative choices for each type of property that could be the subject of such a prosecution. The applicable act and type of property damaged should be selected from among each set of brackets.

Instruction No. P17.100

Damage to Realty or Personalty (Felony)

You have found the defendant guilty of the crime of intentionally damaging property.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Note:

Use Class 1 Misdemeanor punishment Instruction No. 54.700 when the defendant is found guilty of misdemeanor intentional property damage of less than $1,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-137.

CASE AUTHORITY:

Spratley v. Commonwealth, 298 Va. 187, 195–96, 836 S.E. 2d 385, 389 (2019); Knight v. Commonwealth, 61 Va. App. 148, 162–64, 733 S.E.2d 701, 708–09 (2012); Scott v. Commonwealth, 58 Va. App. 35, 49–54, 707 S.E.2d 17, 25–27 (2011); McDuffie v. Commonwealth, 49 Va. App. 170, 176–77, 638 S.E.2d 139, 142 (2006); Fitzgerald v. Commonwealth, 11 Va. App. 625, 627–29, 401 S.E.2d 208, 210–11 (1991); Wise v. Commonwealth, 98 Va. 837, 838–39, 36 S.E. 479, 479 (1900).

PRACTICE COMMENTARY: This instruction combines the felony and Class 1 misdemeanor versions of intentionally damaging property and the Class 3 misdemeanor of unlawfully damaging property. The combination will not be appropriate in all cases and the instruction should be modified based upon the amount of the alleged damages and the alleged *mens rea* of the defendant.

The value of the property damaged, or the amount of the damage determines whether the intentional act version of the offense is a Class 6 felony or a Class 1 misdemeanor. Instruction No. P17.100 reflects the possible punishments for the Class 6 felony. If the defendant is found guilty of the Class 1 misdemeanor and elected jury sentencing, use Instruction No. 54.700. If the defendant elected jury sentencing, include in Instruction 17.100 the Class 3 misdemeanor punishment language contained within the brackets.

The Class 3 misdemeanor offense set forth in Va. Code Ann. § 18.2-137(A) is a lesser included offense of Va. Code Ann. § 18.2-137(B). *Scott, 58 Va. App. at 39, 707 S.E.2d at 19.*

A punishment instruction for the Class 3 misdemeanor of unlawfully damaging property is included in Instruction No. 17.100, since jury punishment proceedings for Class 3 misdemeanors, unlike jury punishment proceedings for felonies and Class 1 misdemeanors, are not bifurcated. Va. Code Ann. § 19.2-295.1.

The word "unlawfully" as used in the statute attaches criminal liability "when property is damaged or destroyed during the commission of an unlawful act, which includes the performance of a lawful act in a criminally negligent manner." *Id. at 52, 707 S.E.2d at 26.* See, e.g., *Crowder v. Commonwealth, 16 Va. App. 382, 429 S.E.2d 893 (1993)* (defendant threw television and damaged a boat).

Bona Fide Claim of Right. It is a defense to this crime that the defendant acted under a bona fide claim of right with an honest belief that the property was his own. *Wise, 98 Va. at 838–39, 36 S.E. at 479.* A trial court commits error by refusing to give a bona fide claim of right instruction where it is adequately supported by the evidence. *Id.*

A vehicle, titled exclusively in a wife's name, which was intentionally damaged

by her husband was "not his own" for purposes of prosecution under Va. Code Ann. § 18.2-137. Defendant husband's claim of right under Virginia's equitable distribution statute was without merit because no equitable distribution decree had been entered at the time of the offense, and the husband's inchoate right, if any, in the vehicle had not vested. *McDuffie, 49 Va. App. at 176–77, 638 S.E.2d at 142.*

Measures of Loss. Va. Code Ann. § 18.2-137(B) provides that the "amount of loss" caused by the damage or destruction may be established by what appear to be two non-exclusive methods: (1) the fair market cost of repair; or (2) the fair market replacement value. These are different measures of loss than are employed in larceny cases. The term "replacement" contemplates the cost of obtaining a substitute item to take the place of the original destroyed item. Consequently, the Commonwealth is not required to present evidence of the age, depreciation or original purchase price of an item in order to establish its fair market replacement value (as would otherwise be required in a larceny case). *Spratley, 298 Va. at 195–96, 836 S.E. 2d at 389.*

☞ ***PRACTICE POINTER:***

A defendant may be convicted of destruction of property in addition to burglary in violation of Va. Code Ann. § 18.2-91 if property was damaged while breaking and entering the building. *Fitzgerald, 11 Va. App. at 628, 401 S.E.2d at 210.*

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after any required modifications are made to the instruction language and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

MICHIE'S JURISPRUDENCE, Autrefois, Acquit and Convict § 18; and Malicious Mischief §§ 1–6

CHAPTER 18

DANGEROUS WEAPONS

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Instruction No. 18.920 Reckless Handling of a Firearm—Misdemeanor

Instruction No. P18.920 Reckless Handling of a Firearm—Misdemeanor

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Instruction No. P18.930 Reckless Handling of a Firearm—Felony

Instruction No. 18.940 Definition of Firearm—Reckless Handling of a Firearm

SCOPE NOTE

These instructions cover the principal offenses relating to the use of dangerous weapons.

The definition of a firearm varies depending upon the statute alleged to have been violated.

"Firearms" where the defendant is charged with possession of a firearm while in possession of a controlled substance is defined in Instruction No. 18.615.

"Firearms" where the defendant is charged with possession, use, or display of a firearm during a drug transaction is defined in Instruction No. 18.616.

"Firearms" where the defendant is charged with possession or transportation of a firearm after having been convicted of a felony is defined in Instruction No. 18.622.

"Firearms" where the defendant is charged with use or display of a firearm during certain enumerated felonies in Va. Code Ann. § 18.2-53.1 is defined in Instruction No. 18.702.

Instruction Nos. 18.100 and 18.200 are based on Va. Code Ann. § 18.2-279. Instruction No. 18.100 covers malicious and unlawful discharge of a firearm within an occupied building.

Instruction No. 18.300 is based on Va. Code Ann. § 18.2-154. It covers malicious shooting or throwing any missile at or against any train, any vessel or other watercraft or any motor vehicle when occupied by one or more persons whereby the life of any person therein may be placed in peril. Instruction No. 18.350 is based on Va. Code Ann. § 18.2-286.1. It covers intentional discharge of a firearm while in or on a vehicle.

Instruction No. 18.400 is based on Va. Code Ann. § 18.2-289 and covers the offense of unlawfully using or possessing a machine gun to commit a crime of violence. Instruction No. 18.420, which is derived from Va. Code Ann. § 18.2-288(1), defines machine gun.

Instruction No. 18.500 stems from Va. Code Ann. § 18.2-300 and covers the crime of possessing or using a "sawed-off" shotgun in a crime of violence. Instruction No. 18.520, based on Va. Code Ann. § 18.2-299, defines "sawed-off" shotgun, and includes "sawed-off" rifles as well. Instruction No. 18.521 defines "sawed-off" rifles.

Instruction No. 18.600, based on Va. Code Ann. § 18.2-308, is limited to the crime of carrying a concealed weapon.

Va. Code Ann. § 18.2-308.4 addresses three crimes involving firearms and controlled substances. First, Va. Code Ann. § 18.2-308.4(A) criminalizes simultaneous possession of a firearm and certain controlled substances. The elements of the crime and the punishment are set out in Instruction No. 18.610. Instruction No. 18.615 provides the definition of firearm applicable to this crime. Second, Va. Code Ann. § 18.2-308.4(B) criminalizes possessing a firearm on or about his person while possessing a controlled substance. The elements of the crime are set out in Instruction No. 18.612. Instruction No. 18.615 provides the definition of firearm applicable to this crime. Finally, Va. Code Ann. § 18.2-308.4(C) criminalizes possession or use of a firearm while committing certain controlled substances offenses. The elements of the crime and the punishment are set out in Instruction No. 18.611. Instruction No. 18.616 provides the definition of firearm applicable to this crime.

Instruction Nos. 18.620 and 18.625 cover possession or transportation of firearms (also stun weapons, ammunition for a firearm and explosive materials), and carrying concealed weapons by felons. Instruction No. 18.622 provides the definition of firearm to be used where the defendant is charged with possessing or transportation of a firearm after having been convicted

of a felony under Va. Code Ann. § 18.2-308.2.

Manufacture, import, sale, transfer or possession of plastic firearms is prohibited by Va. Code Ann. § 18.2-308.5. The elements of the crime and the punishment are set out in Instruction No. 18.630, and the definition of plastic firearm is contained in Instruction No. 18.640.

The crime of making a false statement on a consent form for a firearms dealer to obtain criminal history record is defined in Va. Code Ann. § 18.2-308.2:2. See Instruction No. 18.650.

Instruction No. 18.660 is based on Va. Code Ann. § 18.2-308.2:2 dealing with purchase of a firearm with intent to provide it to a person ineligible to purchase one from a dealer.

Instruction No. 18.700 is based on Va. Code Ann. § 18.2-53.1 covering the crime of using or displaying a firearm in committing or attempting to commit certain felonies. Instruction No. 18.702 provides the definition of firearm applicable to this crime. Instruction No. 18.705 defines firearm when used for purposes of intimidation. This instruction will generally be applicable in robbery or carjacking cases in conjunction with Instruction Nos. 47.100 and 47.200.

Instruction No. 18.710 is based on Va. Code Ann. § 18.2-282 and covers the offense of pointing or brandishing a firearm, or an object similar in appearance.

Instruction No. 18.810 defines actual and constructive possession of a firearm. Instruction No. 18.850 defines deadly weapon. Instruction No. 18.900 is based on Va. Code Ann. § 18.2-308.3 covering the crime of using restricted ammunition in committing or attempting to commit crimes.

No instructions are included for the offenses of recklessly leaving a loaded, unsecured firearm in a manner to endanger the life or limb of a child under fourteen (14) years of age (Va. Code Ann. § 18.2-56.2); or possession of a firearm or other weapon on school property (Va. Code Ann. § 18.2-308.1).

No instruction is included for willfully discharging firearms in public places. For purposes of Va. Code Ann. § 18.2-280, a firearm is any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion or a combustible material. *Gerald v. Commonwealth, 68 Va. App. 167, 175, 805 S.E.2d 407, 412 (2017).*

For criminal offenses related to the possession, purchase, or transport of firearms or other deadly weapons by persons subject to protective orders, see Va. Code Ann. §§ 16.1-253.2(B), 18.2-60.4(B), and 18.2-308.1:4(A),(B). In addition, Va. Code Ann. § 18.2-308.1:4(B) addresses the violation of permanent family violence protective orders while knowingly armed with a firearm or other deadly weapon, deeming such violation a Class 6 felony. There is no case law as to what definition of firearm to use for the above statutes. For Va. Code Ann. § 16.1-253.2(B), there is also no specific definition of "armed" for purposes of the statute. See Instruction 12.300 as an example of an instruction that also doesn't define "armed".

Instruction No. 18.100

Discharging Firearms Within Occupied Building

The defendant is charged with the crime of discharging a firearm within an occupied building. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant discharged a firearm within a building occupied by one or more persons; and

(2) That the firearm was discharged in such a manner as to endanger the life or lives of such person or persons; and

(3) That the act was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of maliciously discharging a firearm[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged, but that the act was done unlawfully and not maliciously, then you shall find the defendant guilty of unlawfully discharging a firearm[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.100(a)

Discharging Firearms Within Occupied Building (Malice)

You have found the defendant guilty of the crime of maliciously discharging a firearm.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

You have found the defendant guilty of the crime of [indicate] discharging a firearm.

I [am inclined to] [do not] [have already] fixed the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment for [not less than] [more than] ten (10) years and a fine of a specific amount, but not more than $10,000.

Instruction No. P18.100(b)

Discharging Firearms Within Occupied Building (Without Malice)

You have found the defendant guilty of the crime of unlawfully discharging a firearm.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-279.

CASE AUTHORITY:

Bryant v. Commonwealth, 295 Va. 302, 309–11, 811 S.E.2d 250, 253–54 (2018); King v. Commonwealth, 264 Va. 576, 580–82, 570 S.E.2d 863, 865–66 (2002); Strickland v. Commonwealth, 16 Va. App. 180, 182, 428 S.E.2d 507, 508 (1993).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-279 also provides that the defendant may be guilty of some form of homicide if any person is killed as a result of the shooting. In such cases, it will be necessary to use the appropriate homicide instructions.

Proof of an accidental or inadvertent discharge of a firearm is not a defense. Va. Code Ann. § 18.2-279 does not require, as an element of the crime of unlawful discharge of a firearm within an occupied building, proof that the firearm was discharged intentionally. *Bryant, 295 Va. at 309–11, 811 S.E.2d at 253–54.*

ALERTS:

• It will be necessary to use an instruction that defines "malice" along with this instruction. See, e.g., Instruction Nos. 33.220 and 37.220.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.200

Shooting/Throwing at Occupied Building

The defendant is charged with the crime of [shooting at; throwing a missile at or against] **an occupied building. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [shot at; threw a missile at or against] **a building occupied by one or more persons; and**

(2) That the life or lives of such person or persons may have been put in peril; and

(3) That the act was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of maliciously [shooting at; throwing a missile at or against] **an occupied building**[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged, but that the act was done unlawfully, and not maliciously, then you shall find the defendant guilty of unlawfully [shooting at; throwing a missile at or against] **an occupied building**[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, then you shall find the defendant not guilty.

Shooting Through a Door-pivot Building

The defendant is charged with the crime of [shooting at through a door-pivot building] in violation of the [Commonwealth] penal [statute].

[Insert the definition from the statute, e.g. "Whoever, with intent to injure, [shoots through a door-pivot building]."]

(2) [Insert the title or titles of such Person or Persons being here the].

(3) [Insert the act with [door-pivot] with malice.]

If you find from the evidence that the [Commonwealth] has proved beyond a reasonable doubt each of the [three] elements of the crime as [charged], then you [may] find the defendant guilty. If you find that the [Commonwealth] has failed to prove beyond a reasonable doubt [either or both] of the first two elements of the crime, then you must find the defendant not guilty.

Instruction No. P18.200(a)

Shooting/Throwing at Occupied Building (Malice)

You have found the defendant guilty of the crime of maliciously [shooting at; throwing a missile at or against] **an occupied building.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

Instruction No. P18.200(b)

Shooting/Throwing at Occupied Building (Without Malice)

You have found the defendant guilty of the crime of unlawfully [shooting at; throwing a missile at or against] **an occupied building.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-279.

CASE AUTHORITY:

Ellis v. Commonwealth, 281 Va. 499, 504–08, 706 S.E.2d 849, 851–54 (2011); King v. Commonwealth, 40 Va. App. 193, 199, 578 S.E.2d 803, 806 (2003); Dowdy v. Commonwealth, 220 Va. 114, 116–17, 255 S.E.2d 506, 508–09 (1979); Etheridge v. Commonwealth, 210 Va. 328, 330–31, 171 S.E.2d 190, 192 (1969).

PRACTICE COMMENTARY: The legislative purpose of Va. Code Ann. § 18.2-279 is to prohibit conduct that endangers the lives of people in occupied dwellings, without regard for the shooter's motive or intent. The Commonwealth is not required to prove that the shooter had a specific intent to shoot at or against a particular building. The Commonwealth must only show that the defendant knew or should have known that an occupied building was in the line of fire. *Ellis, 281 Va. at 506, 706 S.E.2d at 852.*

In *Dowdy*, the defendant fired a shotgun into the front storm door of an occupied house. On appeal, he argued that the Commonwealth had to prove as a fact that the life of the occupant had been endangered. After reviewing the legislative history of Va. Code Ann. § 18.2-279, the court concluded:

> With this history in mind, we construe the language of the present statute as a legislative declaration that human lives may be endangered when a deadly weapon is maliciously discharged at or against a building occupied by people and that such conduct is felonious. In our view, this legislative determination relieves the Commonwealth of the burden of proving that human life was, in fact, endangered.
>
> *220 Va. at 117, 255 S.E.2d at 508.*

The locale of the shooter is not specified by the statute; a person may be convicted of shooting or throwing at an occupied building even if the person shooting is inside the building. *King, 40 Va. App. at 199, 578 S.E.2d at 806.*

"Missile" not defined. Va. Code Ann. § 18.2-279 does not define the term "missile," and no published opinion supplies a definition of the term. A bottle can constitute a missile, even if it did not break when thrown. *Davis v. Commonwealth, Record No. 2480-01-2, 2003 Va. App. LEXIS 242 (Ct. App. Apr. 22, 2003).* Rocks have also been found to be missiles. *Lamb v. Commonwealth, No. 1262-02-2, 2003 Va. App. LEXIS 252 (Ct. App. Apr. 29, 2003).* Ball bearings may also constitute missiles. *Kim v. Commonwealth, 2014 Va. App. LEXIS 145, at *11.* See also Webster's Third New Int'l Dictionary 1445 (defining missile as "capable of being thrown or projected to strike an object at a distance" and as "a weapon or other object thrown or projected (as a stone [or] bullet . . .)").

ALERTS:

- It will be necessary to use an instruction that defines "malice." See, e.g.,

Instruction Nos. 33.220 and 37.200.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.300

Shooting/Throwing at Occupied Vehicle

The defendant is charged with the crime of [shooting at; throwing a missile at or against] **an occupied** [vehicle, train, vessel or watercraft]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [shot at; threw a missile at or against] **a** [vehicle, train, vessel or watercraft]**; and**

(2) **That such** [vehicle, train, vessel or watercraft]**, was occupied by one or more persons; and**

(3) **That as a result, the life of a person in such** [vehicle, train, vessel or watercraft] **may have been put in peril; and**

(4) **That the act was done with malice.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of maliciously [shooting at; throwing a missile at or against] **an occupied** [vehicle, train, vessel or watercraft] [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but that the act was done unlawfully and not maliciously, then you shall find the defendant guilty of unlawfully [shooting at; throwing a missile at or against] **an occupied** [vehicle, train, vessel or watercraft] [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first three elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.300(a)

Shooting/Throwing at Occupied Vehicle (Malice)

You have found the defendant guilty of the crime of maliciously [shooting at; throwing a missile at or against] **an occupied** [vehicle; train; vessel; or watercraft]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

Instruction No. P18.300(b)

Shooting/Throwing at Occupied Vehicle (Without Malice)

You have found the defendant guilty of the crime of unlawfully [shooting at; throwing a missile at or against] **an occupied** [vehicle, train, vessel, or watercraft]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-154.

CASE AUTHORITY:

Commonwealth v. Gregg, 295 Va. 293, 297, 811 S.E.2d 254, 256–57 (2018); Jones v. Commonwealth, 296 Va. 412, 414–17, 821 S.E.2d 540, 542–43 (2018); Stephens v. Commonwealth, 263 Va. 58, 63–64, 557 S.E.2d 227, 230 (2002).

PRACTICE COMMENTARY: The statute specifically mentions that the vehicle can be "any train or cars on any railroad or other transportation company or any vessel or other watercraft, or any motor vehicle or other vehicles."

Where the person dies as a result of the shooting, the defendant may be found guilty of murder if the shooting was malicious or may be found guilty of involuntary manslaughter if the shooting was unlawful. In such cases, appropriate homicide instructions should be used.

If the vehicle is a conspicuously marked law enforcement, fire or rescue squad vehicle, ambulance or other emergency medical vehicle, a mandatory minimum term of imprisonment of one year is required. Va. Code Ann. § 18.2-154.

Each act of firing a weapon at an occupied vehicle constitutes a separate and distinct violation of the statute, notwithstanding how closely each shot follows the other. *Stephens, 263 Va. at 63, 557 S.E.2d at 230.*

The location of the shooter is not an element of the crime of shooting at a motor vehicle under Va. Code Ann. § 18.2-154. Shooting "at" a motor vehicle encompasses a shooting when the shooter is also inside the vehicle when he or she shoots at it. *Jones, 296 Va. at 415–16, 821 S.E.2d at 543.*

On the meaning of the term "missile" as used in Va. Code Ann. § 18.2-154, see the Practice Commentary to Instruction No. 18.200.

ALERTS:

- For definitions of malice, see Instruction Nos. 33.220 and 37.200.
- The jury may be instructed on both common-law involuntary manslaughter and statutory involuntary manslaughter by shooting into an occupied vehicle and causing death under Va. Code Ann. § 18.2-154.
- Both common law involuntary manslaughter and involuntary manslaughter under Va. Code Ann. § 18.2-154 constitute one crime. Accordingly, simultaneous punishment for both common law involuntary manslaughter and manslaughter under Va. Code Ann. § 18.2-154 violates the Double Jeopardy Clause. *Gregg, 295 Va. at 300–01, 811 S.E.2d at 258–59.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.350

Shooting From Vehicle

The defendant is charged with the crime of shooting from a vehicle. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intentionally discharged a firearm; and

(2) That the defendant did so while in or on a motor vehicle; and

(3) That the defendant thereby created a risk of injury or death of another person or caused another person to have a reasonable apprehension of injury or death.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 18.350

Shooting From Vehicle

The defendant is charged with the crime of shooting from a vehicle. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intentionally discharged a firearm; and

(2) That the defendant did so while in or on a motor vehicle; and

That the discharge [insert material element] placed another person in fear of imminent injury or death.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the elements of the crime charged, then you shall find the defendant not guilty.

Instruction No. P18.350

Shooting From Vehicle

You have found the defendant guilty of the crime of shooting from a vehicle.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-286.1.

CASE AUTHORITY:

Stephens v. Commonwealth, 35 Va. App. 141, 543 S.E.2d 609 (2001), aff'd, 263 Va. 58, 63–64, 557 S.E.2d 227, 230 (2002); Morris v. Commonwealth, 21 Va. App. 306, 309–10, 464 S.E.2d 169, 171 (1995).

PRACTICE COMMENTARY: Each act of discharging a firearm from a motor vehicle at another constitutes a separate and distinct violation of Va. Code Ann. § 18.2-286.1. *Stephens, 263 Va. at 63, 557 S.E.2d at 230.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.400

Use of Machine Gun for Crime of Violence

The defendant is charged with the crime of [using; possessing] **a machine gun in** [a crime; an attempted crime] **of violence. The Commonwealth must prove beyond a reasonable doubt that the defendant** [used; possessed] **a machine gun in the** [commission; attempted commission] **of the crime of** (name of crime listed in Va. Code Ann. § 18.2-288)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P18.400

Use of Machine Gun for Crime of Violence

You have found the defendant guilty of the crime of [using; possessing] **a machine gun in** [a crime; an attempted crime] **of violence.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than twenty (20) years; or

(2) Imprisonment for life or for a specific term, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-289.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This crime is part of Virginia's Uniform Machine Gun Act, which is to be "construed as to effectuate its general purpose to make uniform the law of those states which enact it." Va. Code Ann. § 18.2-297.

See *Rose v. Commonwealth, 53 Va. App. 505, 512–16, 673 S.E.2d 489, 492–94 (2009)*, for a case discussing "use" of a firearm. See *Hunter v. Commonwealth, 56 Va. App. 50, 59, 690 S.E.2d 792, 798 (2010)* for a case discussing "possession" of a firearm. See *Atkins v. Commonwealth, 57 Va. App. 2, 22–25, 698 S.E.2d 249, 259–261 (2010)*, for a case discussing constructive possession of a firearm and stating constructive possession may be joint and several.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.420

Machine Gun—Definition

A machine gun is any weapon which shoots or is designed to shoot automatically more than one shot, without manual reloading, by a single function of the trigger.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-288(1).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Proof that the weapon was a machine gun is an element of the crime. Unless there is no issue that the weapon was a machine gun, the instruction must be given.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

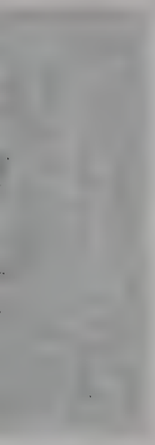
Instruction No. 18.500

Use of "Sawed-Off" Shotgun for Crime of Violence

The defendant is charged with the crime of [using; possessing] **a "sawed-off" shotgun in the** [commission; attempted commission] **of a crime of violence. The Commonwealth must prove beyond a reasonable doubt that the defendant** [used; possessed] **a "sawed-off" shotgun in the** [commission; attempted commission] **of the crime of** (name of crime listed in Va. Code Ann. § 18.2-299)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.



Instruction No. P18.500

Use of "Sawed-Off" Shotgun for Crime of Violence

You have found the defendant guilty of the crime of [using; possessing] **a "sawed-off" shotgun in the** [commission; attempted commission] **of a crime of violence.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life or for a specific term, but not less than twenty (20) years; or

(2) Imprisonment for life or for a specific term, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-300.

CASE AUTHORITY:

Person v. Commonwealth, 60 Va. App. 549, 554–56, 729 S.E.2d 782, 784–85 (2012); *Dillard v. Commonwealth, 28 Va. App. 340, 345–46, 504 S.E.2d 411, 413–15 (1998)*; *Henderson v. Commonwealth, 17 Va. App. 444, 448–50, 438 S.E.2d 292, 294–96 (1993)*; *Rogers v. Commonwealth, 14 Va. App. 774, 776–78, 418 S.E.2d 727, 728–29 (1992)*; *Bruce v. Commonwealth, 9 Va. App. 298, 300–03, 387 S.E.2d 279, 280–81 (1990)*; *Hall v. Commonwealth, 8 Va. App. 350, 351–52, 381 S.E.2d 512, 512–13 (1989)*.

PRACTICE COMMENTARY: Unlawful use or possession of a sawed-off shotgun is a Class 4 felony. Va. Code Ann. § 18.2-300(B). For possession or use of a sawed-off shotgun as permitted by statute, see Va. Code Ann. §§ 18.2-303 and 18.2-303.1. See definitions of particular weapons in Instruction Nos. 18.520 and No. 18.521.

See *Rose v. Commonwealth, 53 Va. App. 505, 512–16, 673 S.E.2d 489, 492–94 (2009)*, for a case discussing "use" of a firearm. See *Hunter v. Commonwealth, 56 Va. App. 50, 59, 690 S.E.2d 792, 798 (2010)* for a case discussing "possession" of a firearm. See *Atkins v. Commonwealth, 57 Va. App. 2, 22–25, 698 S.E.2d 249, 259–261 (2010)*, for a case discussing constructive possession of a firearm and stating constructive possession may be joint and several.

A jury can use its reason, common sense, knowledge, and experience to determine whether a gun meets the statutory definition of "sawed-off shotgun" without testimony regarding the gun's characteristics when the gun itself is admitted into evidence. *Person, 60 Va. App. at 554–56, 729 S.E.2d at 784–85*. The length of a gun in evidence "speaks for itself" and can be relied upon by a trial court. *Taylor v. Commonwealth, 10 Va. App. 260, 391 S.E.2d 592 (1990)*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.520

"Sawed-Off" Shotgun—Definition

A "sawed-off" shotgun is any weapon, loaded or unloaded, originally designed as a shoulder weapon, utilizing a self-contained cartridge from which a number of ball shot pellets or projectiles may be fired simultaneously from a smooth or rifled bore by a single function of the firing device and which has a barrel length of less than eighteen (18) inches for smooth bore weapons and sixteen (16) inches for rifled weapons. A weapon of less than .225 caliber is not a sawed-off shotgun.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-299.

CASE AUTHORITY:

Dillard v. Commonwealth, 28 Va. App. 340, 345, 504 S.E.2d 411, 413 (1998); Rogers v. Commonwealth, 14 Va. App. 774, 776–78, 418 S.E.2d 727, 728–29 (1992); Bruce v. Commonwealth, 9 Va. App. 298, 300–01, 387 S.E.2d 279, 280 (1990).

PRACTICE COMMENTARY: Proof that the weapon was a sawed-off shotgun is an element of the crime prohibited by Va. Code Ann. § 18.2-300. Unless there is no issue that the weapon was a sawed-off shotgun, the instruction must be given. *Bruce, 9 Va. App. at 300–01, 387 S.E.2d at 280.*

The length of a gun in evidence "speaks for itself" and can be relied upon by a trial court. *Taylor v. Commonwealth, 10 Va. App. 260, 391 S.E.2d 592 (1990).*

The fact that the weapon is not immediately operable because of lack of a firing pin is not a defense. *Rogers, 14 Va. App. at 777–78, 418 S.E.2d at 729.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.521

"Sawed-Off" Rifle—Definition

A "sawed-off" rifle means a rifle of any caliber, loaded or unloaded, which expels a projectile by action of an explosion and is designed as a shoulder weapon with a barrel or barrels with length of less than sixteen (16) inches, or which has been modified to an overall length of less than twenty-six (26) inches.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-299.

CASE AUTHORITY:

Rogers v. Commonwealth, 14 Va. App. 774, 777–78, 418 S.E.2d 727, 729 (1992).

PRACTICE COMMENTARY: The fact that the weapon is not immediately operable because of lack of a firing pin is not a defense. *Rogers, 14 Va. App. at 777–78, 418 S.E.2d at 729.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.600

Carrying Concealed Weapon

The defendant is charged with the crime of carrying a concealed weapon. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was carrying (name of weapon listed in Va. Code Ann. § 18.2-308) **about his person; and**

(2) That this weapon was hidden from common observation.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Carrying Concealed Weapon

The defendant is charged with the crime of carrying a concealed weapon. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant was carrying

(2) That this weapon was hidden from common observation.

If you find from all the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you shall find the defendant guilty; but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the crime, you shall find the defendant not guilty.

Instruction No. P18.600

Carrying Concealed Weapon

You have found the defendant guilty of the crime of carrying a concealed weapon.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.

CASE AUTHORITY:

Myers v. Commonwealth, 2021 Va. LEXIS 41 (Va. May 13, 2021); Foley v. Commonwealth, 63 Va. App. 186, 194, 755 S.E.2d 473, 477 (2014); Hunter v. Commonwealth, 56 Va. App. 50, 66, 690 S.E.2d 792, 799–800 (2010); Thompson v. Commonwealth, 277 Va. 280, 287–92, 673 S.E.2d 469, 472–74 (2009); Pruitt v. Commonwealth, 274 Va. 382, 386–89, 650 S.E.2d 684, 685–87 (2007); Farrakhan v. Commonwealth, 273 Va. 177, 182, 639 S.E.2d 227, 230 (2007); Ricks v. Commonwealth, 27 Va. App. 442, 443–45, 499 S.E.2d 575, 575–76 (1998); Winston v. Commonwealth, 26 Va. App. 746, 756, 497 S.E.2d 141, 146–47 (1998); Richards v. Commonwealth, 18 Va. App. 242, 245, 443 S.E.2d 177, 179 (1994); Watson v. Commonwealth, 17 Va. App. 124, 127, 435 S.E.2d 428, 430 (1993); Schaaf v. Commonwealth, 220 Va. 429, 430–32, 258 S.E.2d 574, 574–75 (1979).

PRACTICE COMMENTARY: In *Schaaf, 220 Va. at 431, 435 S.E.2d at 475*, the Court made it clear that carrying a concealed weapon in a handbag constituted concealment about the person and used language to indicate that this also applies to a shoulder bag or to "a handbag or other similar article held in the hand or placed under the arm."

In *Watson, 17 Va. App. at 125, 127, 435 S.E.2d at 429–30*, a gun located underneath the floor mat on the lower left hand corner close to the door of the driver's compartment was deemed to be sufficiently "about the person." In *Hunter*, a gun locked in the glove compartment by the driver was held not to be accessible to the defendant, a passenger, and thus was not "about his person." *56 Va. App. at 61–66, 690 S.E.2d at 797–99.*

A weapon is not concealed "about the person" when it is in the console of a vehicle and the defendant is not in the vehicle. *Pruitt, 274 Va. at 388–89, 650 S.E.2d at 687.*

A weapon is "hidden from common view" where the officer previously had the opportunity to observe defendant from the front and back and saw no visible sign of his carrying a weapon. The evidence was sufficient for conviction when during a chase, the officer observed the defendant retrieve a handgun from his right coat pocket and drop it. See *Winston, 26 Va. App. at 756, 497 S.E.2d at 146–47.*

Va. Code Ann. § 18.2-308(A) provides that a weapon shall be deemed to be hidden from common observation "when it is observable but is of such deceptive appearance as to disguise the weapon's true nature." In *Richards, 18 Va. App. at 245–46, 443 S.E.2d at 179*, the knife was not of such deceptive appearance as to disguise its true nature.

Weapons cases are often very fact specific and can require fine distinctions when determining whether a particular item fits within the terms of the statute.

In order to be a "weapon" within the definition of "weapon of like kind," the item must be designed for fighting purposes or commonly understood to be a "weapon." Subsequent use or circumstances may not be considered in the definitional analysis. *Farrakhan, 273 Va. at 182, 639 S.E.2d at 230.* The decision of the Supreme Court in *Farrakhan* effectively overrules *Delcid v. Commonwealth, 32 Va. App. 14, 526 S.E.2d 273 (2000)*, with respect to the definition of a "weapon of like kind." See *Thompson v. Commonwealth, 277 Va. at 287–92, 673 S.E.2d at 472–74.*

Ricks, 27 Va. App. at 444–45, 499 S.E.2d at 576, holds that a knife, which is concealed for an evil purpose, but which does not meet the statutory definition, is not covered by Va. Code Ann. § 18.2-308.

A box cutter is not a "weapon," and therefore is not a "weapon of like kind" under Va. Code Ann. § 18.2-308(A). *Harris v. Commonwealth, 274 Va. 409, 415, 650 S.E.2d 89, 92 (2007). Harris* effectively overruled *O'Banion v. Commonwealth, 33 Va. App. 47, 60, 531 S.E.2d 599, 605 (2000)*, on this issue. *Harris, 274 Va. at 415, 650 S.E.2d at 91.*

A razor need not have a handle to constitute a weapon under Va. Code Ann. § 18.2-308. *Sykes v. Commonwealth, 37 Va. App. 262, 272, 556 S.E.2d 794, 798 (2001).*

A "butterfly knife" or "balisong" is not a "weapon of like kind" under Va. Code Ann. § 18.2-308. *Thompson, 277 Va. at 287–92, 673 S.E.2d at 472–74.* A scuba knife is not enumerated in the statute nor is it a weapon. *McMillan v. Commonwealth, 55 Va. App. 392, 401, 686 S.E.2d 525, 529 (2009).*

Va. Code Ann. § 18.2-308(B) provides that the statute shall not apply to any person while in his place of abode or the curtilage thereof. "Curtilage" includes the "space necessary and convenient, habitually used for family purposes and carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwellings." *Foley, 63 Va. App. at 194, 755 S.E.2d at 477.* This is a statutory defense for which the defendant bears the burden of persuasion. *Id. at 200–02, 755 S.E.2d at 481.*

Va. Code Ann. § 18.2-308(C)(8) provides that the statute "shall not apply to [a]ny person who may lawfully possess a firearm and is carrying a handgun while in a personal, private motor vehicle or vessel and such handgun is secured in a container or compartment in the vehicle or vessel." The Court of Appeals, in *Doulgerakis v. Commonwealth, 61 Va. App. 417, 421, 737 S.E.2d 40, 42 (2013)*, held that the term "secured" in the predecessor to Va. Code Ann. § 18.2-308(C)(8) need not be synonymous with "locked." A "closed, latched, and 'well-fashioned' glove compartment" met the statutory exemption. *Id. at 422, 737 S.E.2d at 42.*

In *Hodges v. Commonwealth, 64 Va. App. 687, 695, 771 S.E.2d 693, 697 (2015)*, the Court of Appeals held that "secured" is not synonymous with "closed." To fall within the relevant exception, the container within the vehicle must not only be closed, but also must be latched or otherwise fastened. *Id.*

Similarly, in a case involving a zipped backpack, the Virginia Supreme Court held that "the ordinary meaning of 'secured' (when it is not considered an exact synonym of 'locked') includes a fully latched rigid container as well as a fully zipped soft container, such as one made or cloth, canvas, or leather." *Myers v. Commonwealth, 2021 Va. LEXIS 41 (Va. May 13, 2021).* While the Commonwealth bears the ultimate burden of persuasion, the defendant bears the burden of producing "more than a scintilla of evidence" "on a subsection C defense." *Id. at *6.*

A second conviction is punishable as a Class 6 felony. A third or subsequent conviction is punishable as a Class 5 felony. Va. Code Ann. § 18.2-308(A).

The Virginia Supreme Court has held that carrying a concealed weapon and possession by a felon of that same firearm constituted separate acts and, thus, separate offenses supporting separate prosecutions. *Evans v. Commonwealth, 850 S.E.2d 669, 675, 2020 Va. LEXIS 140, at *15 (2020).* These separate prosecutions were not forbidden by Va. Code Ann. § 19.2-294. Id.

The Court of Appeals held that local governing bodies do not have authority from the General Assembly to incorporate Title 18.2, Chapter 7, Article 7 (which contains Va. Code Ann. § 18.2-308). *Amin v. County of Henrico, 63 Va. App. 203, 208, 755 S.E.2d 482, 484 (2014)* (reversing the defendant's conviction for carrying a concealed weapon under the county ordinance); but see Va. Code Ann. § 15.2-915(E) (revised in 2020 to allow localities to adopt ordinances prohibiting possession, carrying, or transportation of firearms on property owned by the locality or at events requiring a permit by the locality).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE, §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.610

Possession of Firearm While in Possession of Certain Controlled Substances

The defendant is charged with the crime of possessing a firearm while possessing a controlled substance. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was unlawfully in possession of** [name of drug] **which is a Schedule** [I; II] **controlled substance; and**

(2) **That at the same time the defendant knowingly and intentionally possessed a firearm.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.610

Possession of Firearm While in Possession of Certain Controlled Substances

You have found the defendant guilty of the crime of possessing a firearm while possessing a controlled substance.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment of not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.4(A).

CASE AUTHORITY:

Atkins v. Commonwealth, 57 Va. App. 2, 22–23, 698 S.E.2d 249, 259 (2010); *Wright v. Commonwealth, 278 Va. 754, 759–61, 685 S.E.2d 655, 657–58 (2009)*; *Maye v. Commonwealth, 44 Va. App. 463, 483–85, 605 S.E.2d 353, 363–64 (2004)*; *McDaniel v. Commonwealth, 264 Va. 429, 429–30, 574 S.E.2d 234, 234 (2002)*; *Jefferson v. Commonwealth, 14 Va. App. 77, 78–81, 414 S.E.2d 860, 860–62 (1992)*.

PRACTICE COMMENTARY: For a definition of possession derived from drug cases, see Instruction No. 22.330. For instructions on possession of Schedule I or Schedule II controlled substances, see Instruction Nos. 22.300, 22.360, and 22.500.

Actual possession of both the firearm and the controlled substance is not required by the wording of Va. Code Ann. § 18.2-308.4. Constructive possession of either or both is sufficient for conviction. *Jefferson, 14 Va. App. 77, 81, 414 S.E.2d 860, at 862*. There is no requirement that the Commonwealth prove a nexus between the firearm and drugs possessed by the defendant. *Wright, 278 Va. at 760–761, 685 S.E.2d at 658*.

To establish constructive possession of a firearm, the Commonwealth must present evidence of acts, statements, conduct, or other circumstances establishing that the defendant was aware of the presence and character of the firearm and that the firearm was subject to his dominion and control. *Atkins, 57 Va. App. 22–23, 698 S.E.2d at 259* (citing *Smallwood v. Commonwealth, 278 Va. 625, 630–631, 688 S.E.2d 154, 157 (2009)*).

"The Commonwealth need not show that the 'instrument was operable, capable of being fired, or had the actual capacity to do serious harm.'" *McDaniel, 264 Va. at 429, 574 S.E.2d at 234* (quoting *Armstrong v. Commonwealth, 263 Va. 573, 562 S.E.2d 139 (2002)*).

The statute does not require that the firearm be used in conjunction with the unlawful activity or in furtherance thereof. *Wright, 278 Va. at 760–61, 685 S.E.2d at 657–58*.

ALERTS:

• Instruction No. 18.615 defining "firearm" should be given in conjunction with this instruction.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.611

Possession, Use or Display of Firearm in Committing or Attempting to Commit Manufacture, Sale, Distribution, Possession With Intent to Manufacture, Sell, Distribute a Schedule I or Schedule II Substance or More Than One Pound of Marijuana

The defendant is charged with the crime of [possessing; using; attempting to use; displaying in a threatening manner] **a firearm while committing or attempting to commit illegal** [manufacture; sale; distribution; possession with intent to manufacture, distribute, sell] **of** [(name of drug), which is a Schedule [I; II] controlled substance; more than one (1) pound of marijuana]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [possessed; used; attempted to use; displayed in a threatening manner] **a firearm; and**

(2) **That the** [possession; use; attempted use; display] **was while committing or attempting to commit illegal** [manufacture; sale; distribution; possession with intent to manufacture, distribute, sell] **of** [(name of drug) which is a Schedule [I; II] controlled substance; more than one (1) pound of marijuana]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.611

Possession, Use or Display of Firearm in Committing or Attempting to Commit Manufacture, Sale, Distribution, Possession With Intent to Manufacture, Sell, Distribute a Schedule I or Schedule II Substance or More Than One Pound of Marijuana

You have found the defendant guilty of the crime of [possessing; using; attempting to use; displaying in a threatening manner] **a firearm while committing or attempting to commit illegal** [manufacture; sale; distribution; possession with intent to manufacture, distribute, sell] **of** [(name of drug) which is a Schedule [I; II] controlled substance; more than one (1) pound of marijuana].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a term of imprisonment of five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.4(C).

CASE AUTHORITY:

Atkins v. Commonwealth, 57 Va. App. 2, 22–23, 698 S.E.2d 249, 259 (2010); *Wright v. Commonwealth, 278 Va. 754, 759–61, 685 S.E.2d 655, 657–58 (2009)*; *McCain v. Commonwealth, 261 Va. 483, 493–94, 545 S.E.2d 541, 547 (2001)*; *Taylor v. Commonwealth, 33 Va. App. 735, 736–38, 536 S.E.2d 922, 922–23 (2000)*; *Clarke v. Commonwealth, 32 Va. App. 286, 304–06, 527 S.E.2d 484, 493–94 (2000)*; *Langston v. Commonwealth, 28 Va. App. 276, 285–87, 504 S.E.2d 380, 385 (1998)*.

PRACTICE COMMENTARY: Actual possession of both the firearm and the controlled substance or marijuana is not required by the wording of Va. Code Ann. § 18.2-308.4. Constructive possession of either or both is sufficient for conviction. *Jefferson v. Commonwealth, 14 Va. App. 77, 81, 414 S.E.2d 860, 862 (1992)*. There is no requirement that the Commonwealth prove a nexus between the firearm and drugs possessed by the defendant. *Wright, 278 Va. at 760–761, 685 S.E.2d at 658*.

To establish constructive possession of a firearm, the Commonwealth must present evidence of acts, statements, conduct, or other circumstances establishing that the defendant was aware of the presence and character of the firearm and that the firearm was subject to his dominion and control. *Atkins, 57 Va. App. 22–23, 698 S.E.2d at 259* (citing *Smallwood v. Commonwealth, 278 Va. 625, 630–31, 688 S.E.2d 154, 157 (2009)*).

The defendant need not possess the firearm in a threatening manner to be convicted under this statute. *Wright v. Commonwealth, 53 Va. App. 266, 281, 670 S.E.2d 772, 779 (2009)*.

Va. Code Ann. § 18.2-308.4(C) is analogous to Va. Code Ann. § 18.2-53.1. It is therefore probable that the cases applying and construing Va. Code Ann. § 18.2-53.1 will also apply here. Thus, double jeopardy is not violated by conviction for the underlying drug felony and the firearms charge. See *Jones v. Commonwealth, 218 Va. 18, 23–24, 235 S.E.2d 313, 316 (1977)*; *Turner v. Commonwealth, 221 Va. 513, 528-30, 273 S.E.2d 36, 46–47 (1980), superseded by statute in part, as stated in Tuggle v. Commonwealth, 228 Va. 493, 504–05, 323 S.E.2d 539, 546 (1984)*.

A conviction under Va. Code Ann. § 18.2-308.4(C) will be sustained even if the defendant is acquitted of the underlying drug charge. See *Reed v. Commonwealth, 239 Va. 594, 597–98, 391 S.E.2d 75, 76–77 (1990)*.

Va. Code Ann. § 18.2-308.4(C) applies to a person who is a principal in the second degree to the firearms offense. See *Cortner v. Commonwealth, 222 Va. 557, 562, 281 S.E.2d 908, 911 (1981)*; *Carter v. Commonwealth, 232 Va. 122, 126, 348 S.E.2d 265, 267 (1986)*.

When the defendant is charged with the "use" of a firearm, the Commonwealth does not need to prove that the victim perceived the weapon as a firearm. *Rose v. Commonwealth, 53 Va. App. 505, 516, 673 S.E.2d 489, 494 (2009).* It is only when the defendant is charged with displaying a firearm in a threatening manner that the prosecution must prove that the victim believed the weapon used was a firearm. *Id.*

Clubbing the victim with a gun constitutes a "use" of the firearm under the statute. *Id.* The statute does not require that the firearm be used in conjunction with the unlawful activity or in furtherance thereof. *Wright, 278 Va. at 760–61, 685 S.E.2d at 657–58.*

ALERTS:

• Instruction No. 18.616 defining a "firearm" should be given in conjunction with this instruction.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.612

Possession of Firearm On or About the Person While in Possession of Certain Controlled Substances

The defendant is charged with the crime of possessing a firearm on or about his person while possessing a controlled substance. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was unlawfully in possession of (name of drug) **which is a Schedule** [I; II] **controlled substance; and**

(2) That at the same time the defendant knowingly and intentionally possessed the firearm; and

(3) That the firearm was on or about the defendant's person.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.612

Possession of Firearm On or About the Person While in Possession of Certain Controlled Substances

You have found the defendant guilty of the crime of possessing a firearm on or about his person while possessing a controlled substance.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment of not less than two (2) years nor more than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.4(B).

CASE AUTHORITY:

Atkins v. Commonwealth, 57 Va. App. 2, 22–25, 698 S.E.2d 249, 259–260 (2010); *Hunter v. Commonwealth, 56 Va. App. 50, 64–65, 690 S.E.2d 792, 799 (2010).*

PRACTICE COMMENTARY: The language "on or about his person" in the statute is not limited to actual possession. This condition can be established by either actual possession or constructive possession. Constructive possession in the context of this offense means that the "defendant was aware of both the presence and character of the firearm, that the firearm was within the accused's dominion and control, and the firearm was readily accessible for prompt and immediate use." *Atkins, 57 Va. App. at 24, 698 S.E.2d at 260* (quoting *Hunter v. Commonwealth, 56 Va. App. 50, 64–65, 690 S.E.2d 792, 799 (2010)*).

The Commonwealth is not required to show that the firearm was operable, capable of being fired, or had an actual capacity to do serious harm. *McDaniel v. Commonwealth, 264 Va. 429, 429–30, 574 S.E.2d 234, 234 (2002)* (quoting *Armstrong v. Commonwealth, 263 Va. 573, 584, 562 S.E.2d 139,145 (2002)*).

ALERTS:

• Instruction No. 18.615, defining a firearm, should be given with this instruction.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.615

Definition of Firearm—§ 18.2-308.4(A), (B)

A firearm is a weapon designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.4(A), (B).

CASE AUTHORITY:

McDaniel v. Commonwealth, 264 Va. 429, 429, 574 S.E.2d 234, 234 (2002); Timmons v. Commonwealth, 15 Va. App. 196, 198–201, 421 S.E.2d 894, 895–97 (1992).

PRACTICE COMMENTARY: The weapon need not be fully loaded or immediately operable. *Timmons, 15 Va. App. at 200–01, 421 S.E.2d at 897; Rogers v. Commonwealth, 14 Va. App. 774, 777–78, 418 S.E.2d 727, 729 (1992).*

The Commonwealth need not show that the "instrument was operable, capable of being fired, or had the actual capacity to do serious harm." *McDaniel, 264 Va. at 429, 574 S.E.2d at 234* (quoting *Armstrong v. Commonwealth, 263 Va. 573, 584, 562 S.E.2d 139, 145 (2002)).*

ALERTS:

• This instruction should be used only in conjunction with Instruction 18.610.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.616

Definition of Firearm—§ 18.2-308.4(C)

A firearm is any instrument that is capable of expelling a projectile by force or gunpowder. A firearm is also an object that is not capable of expelling a projectile by force or gunpowder but gives the appearance of being able to do so.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.4(C).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This instruction should be used when the defendant is charged with possession, use or display of a firearm during a drug transaction. Because Va. Code Ann. § 18.2-308.4(C) is analogous to Va. Code Ann. § 18.2-53.1, the definition of firearm applicable to that section is replicated here. See Instruction No. 18.702 and Case Authority and Practice Commentary for Instruction No. 18.702.

ALERTS:

• This instruction should be used only in conjunction with Instruction No. 18.611.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.620

Possession or Transportation of Firearm, Ammunition, Stun Weapon, or Explosive Material by Felon

The defendant is charged with the crime of [possessing; transporting] **a** [firearm; ammunition for a firearm; stun weapon; explosive material] **after having been convicted of** [(name of felony); (name of violent felony under Va. Code Ann. § 17.1-805)]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant knowingly and intentionally [possessed; transported] **a** [firearm; ammunition for a firearm; stun weapon; explosive material]**; and**

(2) That the defendant had been previously convicted of [(name of applicable felony); (name of applicable violent felony under Va. Code Ann. § 17.1-805)] **under the laws of** [this or any other state; the District of Columbia; the United States or any territory thereof]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of [possession; transportation] **of a** [firearm; ammunition for a firearm; stun weapon; explosive material] **after having been convicted of a** [(name of felony); (name of violent felony under Va. Code Ann. § 17.1-805)] [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.620(a)

Possession or Transportation of Firearm by Felon (Other Felony)

You have found the defendant guilty of the crime of possessing or transporting a firearm after having been convicted of (name of felony)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment of no less than two (2) years, but no more than five (5) years.

Instruction No. P18.620(b)

Possession or Transportation of Firearm by Felon (Violent Felony)

You have found the defendant guilty of the crime of possessing or transporting a firearm after having been convicted of (name of violent felony)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment of five (5) years.

Instruction No. P18.620(c)

Possession or Transportation of Stun Weapon or Explosive Material by Felon

You have found the defendant guilty of the crime of possessing or transporting [a stun weapon; ammunition for a firearm; explosive material] **after having been convicted of** (name of felony).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years;

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.2.

CASE AUTHORITY:

Groffel v. Commonwealth, 849 S.E.2d 905, 2020 Va. LEXIS 158 (2020); Hall v. Commonwealth, 69 Va. App. 437, 447–50, 819 S.E.2d 877, 882–84 (2018); Cartagena v. Commonwealth, 68 Va. App. 202, 208, 807 S.E.2d 223, 226(2017); Butler v. Commonwealth, 64 Va. App. 7, 11–15, 763 S.E.2d 829, 831–33 (2014); Jordan v. Commonwealth, 286 Va. 153, 157–59, 747 S.E.2d 799, 800–02 (2013); Baker v. Commonwealth, 284 Va. 572, 575–79, 733 S.E.2d 642, 644–46 (2012); Preston v. Commonwealth, 281 Va. 52, 58–59, 704 S.E.2d 127, 130 (2011); Redmond v. Commonwealth, 57 Va. App. 254, 263–265, 701 S.E.2d 81, 86–87 (2010); Smallwood v. Commonwealth, 278 Va. 625, 629–31, 688 S.E.2d 154, 156–57 (2009); Palmer v. Commonwealth, 269 Va. 203, 207–08, 609 S.E.2d 308, 310–11 (2005); Morris v. Commonwealth, 269 Va. 127, 131–34, 607 S.E.2d 110, 112–14 (2005); Maye v. Commonwealth, 44 Va. App. 463, 483–85, 605 S.E.2d 353, 363–64 (2004); Jefferson v. Commonwealth, 43 Va. App. 361, 368–69, 597 S.E.2d 290, 294 (2004); Myers v. Commonwealth, 43 Va. App. 113, 121–23, 596 S.E.2d 536, 540-41 (2004); Armstrong v. Commonwealth, 263 Va. 573, 583, 562 S.E.2d 139, 145 (2002); Griffin v. Commonwealth, 33 Va. App. 413, 429–30, 533 S.E.2d 653, 660–61 (2000); Parsons v. Commonwealth, 32 Va. App. 576, 581–84, 529 S.E.2d 810, 813–14 (2000); Dodson v. Commonwealth, 23 Va. App. 286, 296–304, 476 S.E.2d 512, 515–21 (1996); Hancock v. Commonwealth, 21 Va. App. 466, 468–72, 465 S.E.2d 138, 139–42 (1995); Essex v. Commonwealth, 18 Va. App. 168, 170–73, 442 S.E.2d 707, 708–10 (1994); Blake v. Commonwealth, 15 Va. App. 706, 708–09, 427 S.E.2d 219, 220–21 (1993); Jefferson v. Commonwealth, 14 Va. App. 77, 79–81, 414 S.E.2d 860, 861–62 (1992); Allen v. Commonwealth, 3 Va. App. 657, 664, 353 S.E.2d 162, 166 (1987); Glover v. Commonwealth, 3 Va. App. 152, 159–62, 348 S.E.2d 434, 439–41 (1986), aff'd, 236 Va. 1, 1–2, 372 S.E.2d 134, 134 (1988).

PRACTICE COMMENTARY: Instruction No. P18.620(a) is used when the defendant has been convicted within the prior ten years of a nonviolent felony. Instruction No. P18.620(b) is used when the defendant has been convicted of a violent felony defined by Va. Code Ann. § 17.1-805. Instruction No. P18.620(c) is used when the defendant has been convicted of a nonviolent felony more than ten years prior to the current offense.

Subsections B and C of Va. Code Ann. § 18.2-308.2 list the persons to whom Va. Code Ann. § 18.2-308.2 is not applicable.

The Commonwealth is not required to accept the defendant's stipulation of a felony conviction and may offer a certified copy of the conviction order to prove that element of the offense. *Girard v. Commonwealth, 66 Va. App. 230, 238–39, 783 S.E.2d 561, 565 (2016)* (New York certification of disposition—combined with

additional related evidence—was sufficient proof of prior felony conviction); *Boone v. Commonwealth, 285 Va. 597, 603, 740 S.E.2d 11, 14 (2013)*; *Essex, 18 Va. App. at 171, 442 S.E.2d at 709.*

"Possession of a firearm may be actual or constructive." *Hall, 69 Va. App. at 448, 819 S.E.2d at 882.*

To establish constructive possession of a firearm, the Commonwealth must present evidence of acts, statements, conduct, or other circumstances establishing that the defendant was aware of the presence and character of the firearm and that the firearm was subject to his dominion and control. *Atkins, 57 Va. App. 22–23, 698 S.E.2d at 259.* For example, the presence of a handgun in a car on top of the console between the defendant (driver) and a passenger established constructive possession. *Smallwood, 278 Va. at 630–631, 701 S.E.2d at 156–157.* Evidence of guns visible through the glass of a gun cabinet in a home owned by the defendant was also sufficient to establish dominion and control, and knowledge of their presence and character. *Redmond, 57 Va. App. at 265–266, 701 S.E.2d at 86–87.*

The evidence was sufficient to establish constructive possession of a firearm where, in addition to other circumstances, the firearm was found at an address where defendant kept multiple vehicles, defendant reported this address to the DMV, defendant was alone at the residence the week before the search warrant was executed, and defendant had numerous personal items in the bedroom where the firearm was found in plain view. *Hall, 69 Va. App. at 447–50, 819 S.E.2d at 882–84.*

Under the single possession doctrine, possession of two or more firearms at the same time constitutes one offense. *Acey v. Commonwealth, 29 Va. App. 240, 249–51, 511 S.E.2d 429, 433–34 (1999).* Likewise, a defendant cannot be convicted of both possession of a firearm and possession of ammunition under the statute. *Groffel, 2020 LEXIS at *2, 849 S.E.2d at 905.* This is true even if the ammunition is not of the type used by the firearm in question. *Id.* By the same token, possession of the same firearm on separate proven occasions constitutes separate offenses. *Baker, 284 Va. at 578, 733 S.E.2d at 645–46.* Finally, carrying a concealed weapon and possession by a felon of that same firearm constitute separate acts and, thus, separate offenses supporting separate prosecutions. *Evans v. Commonwealth, 850 S.E.2d 669, 675, 2020 Va. LEXIS 140 *15 (2020).* These separate prosecutions were not forbidden by Va. Code Ann. § 19.2-294. *Id.*

Where a defendant was charged with burglary, grand larceny, and possession of a firearm as a convicted felon, and the possession charge was severed from the other two charges so as to avoid undue prejudice to defendant in his trial for burglary and grand larceny, and the defendant was acquitted on those two charges, the defendant's subsequent trial on the possession charge did not violate either collateral estoppel or the defendant's Double Jeopardy rights. *Currier v. Commonwealth, 65 Va. App. 605, 612–14, 779 S.E.2d 834, 837–38 (2015).*

A flare gun is a "firearm" under Va. Code Ann. § 18.2-308(A). *Morris, 269 Va. at 131, 607 S.E.2d at 112.*

In *Armstrong*, the court held that it is not necessary that the Commonwealth prove the instrument was "operable," "capable" of being fired, or had the "actual capacity to do serious harm." *Armstrong, 263 Va. at 583, 562 S.E.2d at 145*; see also *McDaniel, 264 Va. at 429, 574 S.E.2d at 234.*

For the defense of duress or necessity, see Instruction No. 52.300; *Small v. Commonwealth, 292 Va. 292, 299–300, 788 S.E.2d 702, 705–06 (2016)*; *Edmonds v. Commonwealth, 292 Va. 301, 306–08, 787 S.E.2d 860, 862–63 (2016)*; *Byers v. Commonwealth, 37 Va. App. 174, 183–86, 554 S.E.2d 714, 718–19 (2001)*; *Humphrey v. Commonwealth, 37 Va. App. 36, 44–53, 553 S.E.2d 546, 552–55 (2001).*

Stun weapon is defined in Va. Code Ann. § 18.2-308.1(G). Explosive material and ammunition for a firearm are defined in Va. Code Ann. § 18.2-308.2(D).

Restoration of a defendant's civil rights after the service of his sentence for a felony (armed robbery) in a foreign state does not preclude the use of that conviction as a predicate felony under Va. Code Ann. § 18.2-308.2. *Farnsworth v. Commonwealth, 43 Va. App. 490, 496, 599 S.E.2d 482, 484–85 (2004), aff'd, 270 Va. 1, 2, 613 S.E.2d 459, 460 (2005), overruled in part, as stated in Gallagher v. Commonwealth, 284 Va. 444, 453–54, 732 S.E.2d 22, 27 (2012).*

A defendant charged under this section has a viable due process defense if he reasonably and in good faith does what he is told he could do by a public officer or body charged by law with responsibility for defining permissible conduct. *Palmer v. Commonwealth, 48 Va. App. 457, 464, 632 S.E.2d 611, 614 (2006).*

The mandatory punishment under Va. Code Ann. § 18.2-308.2(A) does not violate the constitutional provision requiring separation of powers between the legislature and judiciary. *Johnson v. Commonwealth, 56 Va. App. 244, 253, 692 S.E.2d 651, 655 (2010).*

In *Martin v. Commonwealth, 64 Va. App. 666, 669–74, 770 S.E.2d 795, 796–98 (2015)*, the Court of Appeals considered—and rejected—a defendant's argument that the General Assembly's "retroactive re-categorization" of statutory burglary, an offense of which the defendant was previously convicted, as a "violent felony" under Va. Code Ann. § 17.1-805(C), violated Article I, Section 10 of the United States Constitution (the Ex Post Facto Clause), where the defendant was subject to a mandatory minimum sentence after being convicted of a new and different crime.

The date of the prior felony conviction is not an element of the underlying offense, i.e., possession of a weapon by a convicted felon. The only elements of the offense are (1) possession of a weapon, and (2) a prior conviction of a felony. The date of the conviction is simply a sentencing factor. *Butler, 64 Va. App. at 12, 763 S.E.2d at 831.*

The statute includes (1) any person convicted of a felony; (2) any person adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of murder, kidnapping, robbery by firearm, or rape; or (3) any person under the age of 29 who was adjudicated delinquent as a juvenile 14 years of age or older

of any other felony and knowingly and intentionally possessed, transported or carried about his person a firearm, ammunition or other weapon enumerated in the statute.

Petitions and an undated order of the Juvenile and Domestic Relations District Court were found to be adequate to establish the fact of an applicable juvenile disposition in *Perez v. Commonwealth, 274 Va. 724, 728–30, 652 S.E.2d 95, 97–98 (2007)*. However, when a court order is submitted to establish a predicate conviction, the order must show that a judgment of conviction was entered by the court. *Preston v. Commonwealth, 281 Va. at 58–59, 704 S.E.2d at 130*; *Overbey v. Commonwealth, 271 Va. 231, 234, 623 S.E.2d 904, 905–906 (2006)*; *Palmer, 269 Va. at 207, 609 S.E.2d at 310.*

Partially filling out background forms and paying for a firearm constitutes an attempt to knowingly and intentionally possess or transport a firearm under Va. Code Ann. § 18.2-308(A). *Watkins v. Commonwealth, 62 Va. App. 263, 268–69, 746 S.E.2d 77, 79–80 (2013).*

ALERTS:

• Instruction No. 18.622, defining "firearm," should be given in conjunction with this instruction. *Kingsbur v. Commonwealth, 267 Va. 348, 351, 593 S.E.2d 208, 209–210 (2004).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.622

Definition of Firearm—Convicted Felon

A firearm is an instrument designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-308.2.

CASE AUTHORITY:

Jordan v. Commonwealth, 286 Va. 153, 157, 747 S.E.2d 799, 801 (2013); Alger v. Commonwealth, 267 Va. 255, 258–61, 590 S.E.2d 563, 564–66 (2004); Kingsbur v. Commonwealth, 267 Va. 348, 351–52, 593 S.E.2d 208, 209–10 (2004); McDaniel v. Commonwealth, 264 Va. 429, 429, 574 S.E.2d 234, 234 (2002); Armstrong v. Commonwealth, 263 Va. 573, 583, 562 S.E.2d 139, 145 (2002); Redd v. Commonwealth, 29 Va. App. 256, 258–59, 511 S.E.2d 436, 437–38 (1999); Dodson v. Commonwealth, 23 Va. App. 286, 476 S.E.2d 512 (1996); Hancock v. Commonwealth, 21 Va. App. 466, 465 S.E.2d 138 (1995); Essex v. Commonwealth, 18 Va. App. 168, 442 S.E.2d 707 (1994); Blake v. Commonwealth, 15 Va. App. 706, 427 S.E.2d 219 (1993); Jefferson v. Commonwealth, 14 Va. App. 77, 414 S.E.2d 860 (1992); Allen v. Commonwealth, 3 Va. App. 657, 353 S.E.2d 162 (1987); Glover v. Commonwealth, 3 Va. App. 152, 348 S.E.2d 434 (1986), aff'd, 236 Va. 1, 372 S.E.2d 134 (1988).

PRACTICE COMMENTARY: A firearm is an instrument that was designed, made, and intended to expel a projectile by means of an explosion. *Armstrong, 263 Va. at 583, 562 S.E.2d at 145.* In *Armstrong*, the court held that it is not necessary that the Commonwealth prove the instrument was "operable," "capable" of being fired, or had the "actual capacity to do serious harm." *Id.*; see also *McDaniel, 264 Va. at 429, 574 S.E.2d at 234.*

A BB gun is not a firearm, nor is a weapon that expels its projectile by pneumatic pressure. *Jones, 16 Va. App. at 358, 425 S.E.2d at 617.* In contrast, a flare gun meets the definition of a firearm. *Morris v. Commonwealth, 269 Va. 127, 131–32, 607 S.E.2d 110, 112–13 (2005); Quesenberry v. Commonwealth, 41 Va. App. 126, 129, 583 S.E.2d 55, 56 (2003).*

Showing an object that appears to be a gun and threatening to kill is "an implied assertion" that the object is a firearm. *Jordan, 286 Va. at 157–58, 747 S.E.2d at 801* (citing *Redd, 29 Va. App. at 259, 511 S.E.2d at 438*). Pointing an object that appears to be a gun at a person and directing the person to exit a vehicle may also constitute an implied assertion that the object is a firearm. *Id., 747 S.E.2d at 801.*

ALERTS:

• This instruction should only be used in cases where the defendant is charged with possessing or transporting a firearm after having been convicted of a felony. Va. Code Ann. § 18.2-308.2.

• In a case where the defendant is charged with possession of a firearm by an illegal alien under Va. Code Ann. § 18.2-308.2:01(B), the meaning of "firearm" under that statute is the same as the meaning under Va. Code Ann. § 18.2-308.2. *Adjei v. Commonwealth, 63 Va. App. 727, 752, 763 S.E.2d 225, 237 (2014)* (holding that proof of operability was not required to establish that the weapon was

a "firearm" under Va. Code Ann. § 18.2-308.2:01(B)).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.625

Carrying Concealed Weapon by Felon

The defendant is charged with the crime of carrying a concealed weapon after having been convicted of a felony. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant knowingly and intentionally carried about his person, hidden from common observation, a** [(name of weapon listed in Va. Code Ann. § 18.2-308(A)); weapon substantially similar to (designate one or more weapon(s) enumerated in Va. Code Ann. § 18.2-308(A))]**; and**

(2) **That the defendant had been previously convicted of** (name of applicable felony) **under the laws of** [this or any other state; the District of Columbia; the United States or any territory thereof]**.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 16.3.23

Carrying Concealed Weapon by Felon

The defendant is charged with the crime of carrying a concealed weapon after having been convicted of a felony. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant knowingly and intentionally carried about his person, hidden from common observation, a [name of weapon listed in Va. Code Ann. § 18.2-308(A)]; weapon substantially similar to (designate one or more weapon(s) enumerated in Va. Code Ann. § 18.2-308(A))]; and

(2) That the defendant had been previously convicted of a felony (specify felony) under the laws of [this or any other state, the District of Columbia, the United States or any territory thereof].

If you find from the evidence, beyond a reasonable doubt, each of these elements of the crime to exist, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the evidence, [or from the evidence] beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.625

Carrying Concealed Weapon by Felon

You have found the defendant guilty of the crime of carrying a concealed weapon after having been convicted of a felony.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than 1 (one) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than 12 months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than 12 months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. § 18.2-308.2.

Case Authority:

Thompson v. Commonwealth, 277 Va. 280, 287–92, 673 S.E.2d 469, 471–74 (2009); *Farrakhan v. Commonwealth, 273 Va. 177, 179, 182–83, 639 S.E.2d 227, 228, 230–31 (2007)*; *Mouberry v. Commonwealth, 39 Va. App. 576, 582–86, 575 S.E.2d 567, 569–70 (2003).*

Practice Commentary: The concealed weapon shall be forfeited and disposed of as provided in Va. Code Ann. § 19.2-386.29. Subsections B and C of Va. Code Ann. § 18.2-308.2 list the persons to whom Va. Code Ann. § 18.2-308.2 is not applicable.

A box cutter is not a "weapon," and therefore is not a "weapon of like kind" under Va. Code Ann. § 18.2-308(A). *Harris v. Commonwealth, 274 Va. 409, 415, 650 S.E.2d 89, 92 (2007). Harris* effectively overruled—on this issue—the decision of the Court of Appeals in *O'Banion v. Commonwealth, 33 Va. App. 47, 60, 531 S.E.2d 599, 605 (2000).* A "butterfly knife" or "balisong" is not a "weapon of like kind" under Va. Code Ann. § 18.2-308. *Thompson, 277 Va. at 287–92, 673 S.E.2d at 472–74.*

The Court of Appeals has held that whether a knife's fighting qualities make it a "weapon of like kind" within the intendment of Va. Code Ann. § 18.2-308(A) "involves 'a question of fact determined by the trier of fact according to the circumstances of the case.' " *Ohin v. Commonwealth, 47 Va. App. 194, 199, 622 S.E.2d 784, 786–87 (2006).* That holding may be in tension with the analysis in *Thompson v. Commonwealth, 277 Va. 280, 287–92, 673 S.E.2d 469, 471–74 (2009).*

In order to be a "weapon" within the definition of "weapon of like kind," the item must be designed for fighting purposes or commonly understood to be a "weapon." *Farrakhan, 273 Va. at 182, 639 S.E.2d at 230* (holding that a large kitchen knife was not a "weapon" under Va. Code Ann. § 18.2-308(A)).

The Virginia Supreme Court has held that carrying a concealed weapon and possession by a felon of that same firearm constituted separate acts and, thus, separate offenses supporting separate prosecutions. *Evans v. Commonwealth, 850 S.E.2d 669, 675, 2020 Va. LEXIS 140 *15 (2020).* These separate prosecutions were not forbidden by Va. Code Ann. § 19.2-294. *Id.*

A defendant charged under this section has a viable due process defense for reasonably and in good faith doing what he is told he could do by a public officer or body charged by law with responsibility for defining permissible conduct. *Palmer v. Commonwealth, 48 Va. App. 457, 462, 632 S.E.2d 611, 613 (2006).*

The decision of the Supreme Court in *Farrakhan* effectively overrules *Delcid v. Commonwealth, 32 Va. App. 14, 526 S.E.2d 273 (2000)* with respect to the

definition of a "weapon of like kind." See *Thompson, 51 Va. App. at 221 n.1, 656 S.E.2d at 416 n.1.*

The statutory prohibition also includes any person under the age of twenty-nine (29) who was adjudicated delinquent as a juvenile fourteen (14) years of age or older at the time of the offense of a delinquent act which would be a felony if committed by an adult. It includes any person adjudicated delinquent, on or after July 1, 2005, as a juvenile fourteen (14) years of age or older at the time of the offense of murder, kidnapping, robbery by the threat or presentation of firearms, or rape. *See* Va. Code Ann. § 18.2-308.2(A).

Petitions and an undated order of the Juvenile and Domestic Relations District Court were found to be adequate to establish the fact of an applicable juvenile disposition in *Perez v. Commonwealth, 274 Va. 724, 728–30, 652 S.E.2d 95, 97–98 (2007).* However, when a court order is submitted to establish a predicate conviction, the order must show that a judgment of conviction was entered by the court. *Preston v. Commonwealth, 281 Va. at 58–59, 704 S.E.2d at 130; Overbey v. Commonwealth, 271 Va. 231, 234, 623 S.E.2d 904, 905–906 (2006); Palmer v. Commonwealth, 269 Va. 203, 207, 609 S.E.2d 308, 310 (2005).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.630

Manufacture, Import, Sale, Transfer or Possession of Plastic Firearm

The defendant is charged with the crime of [manufacturing; importing; selling; transferring; possessing] **a plastic firearm. The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly and intentionally** [manufactured; imported; sold; transferred; possessed] **a plastic firearm.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P18.630

Manufacture, Import, Sale, Transfer or Possession of Plastic Firearm

You have found the defendant guilty of the crime of [manufacturing; importing; selling; transferring; possessing] **a plastic firearm.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.5.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Instruction No. 18.640 defining "plastic firearm" and Instruction No. 18.705 defining "firearm" should be given in conjunction with this instruction.

ALERTS:

• Va. Code Ann. § 18.2-308.5 does not specify that the act must be done knowingly and intentionally. The instruction is drafted in the belief that these mental states are implied based on the statutory language.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.640

Plastic Firearm—Definition

A plastic firearm is any firearm containing less than 3.7 ounces of electromagnetically detectable metal in the barrel, slide, cylinder, frame or receiver, of which, when subjected to inspection by X-ray machines commonly used at airports, does not generate an image that accurately depicts its shape.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.5.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: For a discussion of definitions of a "firearm," see *Armstrong v. Commonwealth, 263 Va. 573, 578, 562 S.E.2d 139, 142 (2002).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.650

False Statement on Consent Form for Firearms Dealer to Obtain Criminal History Record

The defendant is charged with the crime of making a materially false statement on the form consenting to have a dealer obtain his criminal history record. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant completed a form provided by the Virginia Department of State Police consenting to have a firearms dealer obtain his criminal history record; and

(2) That the defendant willfully and intentionally made a false statement on the consent form; and

(3) That the false statement was material to a determination as to whether the defendant was eligible to purchase a firearm.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.650

False Statement on Consent Form for Firearms Dealer to Obtain Criminal History Record

You have found the defendant guilty of the crime of making a materially false statement on the form consenting to have a dealer obtain his criminal history record.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.2:2(K).

CASE AUTHORITY:

Cartagena v. Commonwealth, 68 Va. App. 202, 211, 807 S.E.2d 223, 228 (2017); *Maldonado-Mejia v. Commonwealth, 287 Va. 49, 56–66, 752 S.E.2d 833, 836–37 (2014)*; *Smith v. Commonwealth, 282 Va. 449, 455, 718 S.E.2d 452, 455 (2011)*; *Adkins v. Commonwealth, 27 Va. App. 166, 168–71, 497 S.E.2d 896, 896–98 (1998)*; *Richardson v. Commonwealth, 21 Va. App. 93, 100, 462 S.E.2d 120, 124 (1995)*; *Brooks v. Commonwealth, 19 Va. App. 563, 566, 454 S.E.2d 3, 5 (1995)*.

PRACTICE COMMENTARY: In a prosecution under Va. Code Ann. § 18.2-308.2:2(K), proof that the defendant willfully and intentionally made the false statement is an element of the offense, and the Commonwealth must prove, beyond a reasonable doubt, that the defendant had actual knowledge that his statement was false when he made it. *Smith, 282 Va. at 455, 718 S.E.2d at 455*.

Va. Code Ann. § 18.2-308.2:2 includes two separate misdemeanor offenses (in subsections E and R) for which no instructions have been drafted.

Firearm and handgun, for the purpose of this crime, are defined in Va. Code Ann. § 18.2-308.2:2(G).

Richardson, 21 Va. App. at 100, 462 S.E.2d at 124, held that the defendant made a material false statement on a firearm purchase form by falsely answering that he was not under indictment, even though no state law prohibited possession of a firearm by a person under indictment.

For a discussion of what constitutes a "misdemeanor crime of domestic violence" for purposes of the ATF Form 4473, see *Marshall v. Commonwealth, 69 Va. App. 648, 822 S.E.2d 389 (2019)* (any conviction under Va. Code Ann. § 18.2-57.2, assault and battery against a family member, involves a sufficient use of physical force to qualify as a conviction for a "misdemeanor crime of domestic violence" for purposes of the ATF Form 4473).

ALERTS:

• *Brooks, 19 Va. App. at 566, 454 S.E.2d at 5*, holds that a false response to a question not specifically included in the federal firearms transaction record is not a violation of Va. Code Ann. § 18.2-308.2:2(K).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.660

Purchasing Firearm With Intent to Provide It to Person Who Is Ineligible to Acquire One From Dealer

The defendant is charged with the crime of purchasing a firearm with intent to provide it to any person who is ineligible to acquire one from a dealer. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant purchased a firearm; and

(2) That the defendant intended at the time of the purchase to resell or otherwise provide that firearm to any person who he knows or has reason to believe was ineligible to purchase or receive a firearm from a dealer.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of the elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.660

Purchasing Firearm With Intent to Provide It to Person Who Is Ineligible to Acquire One From Dealer

You have found the defendant guilty of the crime of purchasing a firearm with intent to provide it to any person who is ineligible to acquire one from a dealer.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.2:2(M).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This offense is a Class 4 felony. Transporting such a firearm out of the Commonwealth to be resold or provided to one who is ineligible to obtain it from a dealer is also a Class 4 felony. The instruction should be revised accordingly if the defendant is charged with the prohibited transportation.

For mandatory sentence requirements, see Va. Code Ann. § 18.2-308.2:2(M).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.700

Use or Display of Firearm in Committing or Attempting to Commit Murder, Rape, Robbery, Carjacking, Burglary, Malicious Wounding, Abduction, Forcible Sodomy, or Animate/ Inanimate Object Sexual Penetration

The defendant is charged with the crime of [displaying in a threatening manner; using; attempting to use] (name of firearm listed in Va. Code Ann. § 18.2-53.1) **while committing or attempting to commit** (name of crime listed in Va. Code Ann. § 18.2-53.1)**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [displayed in a threatening manner; used; attempted to use] (name of firearm listed in Va. Code Ann. § 18.2-53.1)**; and**

(2) That the [display; use; attempted use] **occurred while the defendant was committing or attempting to commit** (name of crime listed in Va. Code Ann. § 18.2-53.1)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.700

Use or Display of Firearm in Committing or Attempting to Commit Murder, Rape, Robbery, Carjacking, Burglary, Malicious Wounding, Abduction, Forcible Sodomy or Animate/ Inanimate Object Sexual Penetration

You have found the defendant guilty of the crime of [displaying in a threatening manner; using; attempting to use] (name of firearm listed in Va. Code Ann. § 18.2-53.1) **while committing or attempting to commit** (name of crime listed in Va. Code Ann. § 18.2-53.1).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a term of imprisonment of three (3) years.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-53.1.

Case Authority:

Barney v. Commonwealth, 69 Va. App. 604, 613–14, 822 S.E.2d 368, 373 (2019); *Graves v. Commonwealth, 294 Va. 196, 208, 805 S.E.2d 226, 232 (2017)*; *Commonwealth v. Herring, 288 Va. 59, 79, 758 S.E.2d 225, 236 (2014)*; *Hines v. Commonwealth, 59 Va. App. 567, 582, 721 S.E.2d 792, 799 (2012)*; *Startin v. Commonwealth, 281 Va. 374, 383, 706 S.E.2d 873, 879 (2011)*; *Rowland v. Commonwealth, 281 Va. 396, 399–402, 707 S.E.2d 331, 333–34 (2011)*; *Rose v. Commonwealth, 53 Va. App. 505, 516, 673 S.E.2d 489, 494 (2009)*; *Breeden v. Commonwealth, 43 Va. App. 169, 180–81, 596 S.E.2d 563, 569 (2004); Akers v. Commonwealth, 31 Va. App. 521, 532, 525 S.E.2d 13, 19 (2000); Batts v. Commonwealth, 30 Va. App. 1, 11–13, 515 S.E.2d 307, 312–14 (1999); Thomas v. Commonwealth, 25 Va. App. 681, 684–88, 492 S.E.2d 460, 462-63 (1997); Johnson v. Commonwealth, 20 Va. App. 547, 554, 458 S.E.2d 599, 602 (1995); Yarborough v. Commonwealth, 247 Va. 215, 218–19, 441 S.E.2d 342, 343–44 (1994); Blake v. Commonwealth, 15 Va. App. 706, 706–09, 427 S.E.2d 219, 220–21 (1993); Creasy v. Commonwealth, 9 Va. App. 470, 473, 389 S.E.2d 316, 318 (1990); Scaggs v. Commonwealth, 5 Va. App. 1, 6–7, 359 S.E.2d 830, 832–33 (1987); Davis v. Commonwealth, 4 Va. App. 27, 29–31, 353 S.E.2d 905, 906–07 (1987); Carter v. Commonwealth, 232 Va. 122, 125–27, 348 S.E.2d 265, 267–68 (1986); Cortner v. Commonwealth, 222 Va. 557, 562–63, 281 S.E.2d 908, 911 (1981); Flythe v. Commonwealth, 221 Va. 832, 833–35, 275 S.E.2d 582, 583–84 (1981); Holloman v. Commonwealth, 221 Va. 196, 197, 269 S.E.2d 356, 357 (1980); Ansell v. Commonwealth, 219 Va. 759, 760–63, 250 S.E.2d 760, 761–63 (1979); Jones v. Commonwealth, 218 Va. 18, 22–24, 235 S.E.2d 313, 315–16 (1977).*

Practice Commentary: ***Double Jeopardy:*** Convictions for violation of Va. Code Ann. § 18.2-53.1 and robbery do not violate double jeopardy. *Jones, 218 Va. at 24, 235 S.E.2d at 316.* Nor is double jeopardy violated by conviction under Va. Code Ann. § 18.2-53.1 as well as Va. Code Ann. § 18.2-31; *Turner v. Commonwealth, 221 Va. 513, 528–30, 273 S.E.2d 36, 46–47 (1980), superseded by statute in part, as stated in Tuggle v. Commonwealth, 228 Va. 493, 504–05, 323 S.E.2d 539, 546 (1984).* A defendant may be found guilty of use of a firearm during a felony, even when the jury decides to find the defendant is not guilty of the underlying predicate felony. *McQuinn v. Commonwealth, 298 Va. 456, 839 S.E.2d 907, 910 (2020)* (abduction, malicious wounding); *Reed v. Commonwealth, 239 Va. 594, 598, 391 S.E.2d 75, 77 (1990)* (robbery).

Further, double jeopardy is not violated for convictions of both maliciously shooting under Va. Code Ann. § 18.2-154, and use of a firearm in the commission of a murder under Va. Code Ann. § 18.2-53.1. *Willis v. Commonwealth, 10 Va. App. 430, 444, 393 S.E.2d 405, 412 (1990).*

Definition of "Firearm" Under *Va. Code Ann.* § 18.2-53.1: See *Holloman, 221 Va. at 198, 269 S.E.2d at 357*, and Instruction No. 18.702 defining firearm.

For purposes of Va. Code Ann. § 18.2-53.1, a firearm includes an object that is not operational, (i.e., it is not capable of firing projectiles) but gives the appearance of being able to do so. *Startin, 281 Va. at 382–83, 706 S.E.2d 878–89*; *Barney, 69 Va. App. at 613, 822 S.E.2d at 373. Startin* effectively overrules *Sprouse v. Commonwealth, 19 Va. App. 548, 453 S.E.2d 303 (1995).*

Sufficiency of the Evidence: For purposes of Va. Code Ann. § 18.2-53.1, "possession of a firearm is an essential element of the statutory offense." *Yarborough, 247 Va. at 219, 441 S.E.2d at 343.*

The Court of Appeals has explained that to obtain a conviction for violating Va. Code Ann. § 18.2-53.1, "the Commonwealth must prove either (1) the defendant possessed an actual firearm; that is, an instrument designed, made and intended to expel a projectile by means of an explosion, regardless of operability, *Yarborough, 247 Va. at 218, 441 S.E.2d 342*; or (2) that the defendant possessed an object that was not an actual firearm but that gave the appearance of being one, *Startin, 281 Va. 374, 706 S.E.2d 873.*" *Barney, 69 Va. App. at 613, 822 S.E.2d at 373.*

The existence of the firearm may be proved by circumstantial evidence. *Powell v. Commonwealth, 268 Va. 233, 237, 602 S.E.2d 119, 121 (2004)* (affirming conviction under Va. Code Ann. § 18.2-53.1 even though no firearm was found).

Evidence was sufficient to convict when the defendant told the victim "I have a gun," and that he would "have to kill" or "shoot," even though the victim never saw a gun. *Courtney v. Commonwealth, 281 Va. 363, 368, 706 S.E.2d 344, 346 (2011).*

The evidence was sufficient to convict defendant of using a firearm during the commission of a robbery where, although no firearm or facsimile of a firearm was seen or recovered, defendant made statements and gestures to imply that she had a firearm, including threatening to shoot the victim and making a poking motion with something in her pocket. *Barney, 69 Va. App. at 615, 822 S.E.2d at 374.*

Mere membership in a mob, while sufficient for conviction of lynching under Va. Code Ann. § 18.2-42.1, is not of itself sufficient for a conviction of use of a firearm under Va. Code Ann. § 18.2-53.1. *Paiz v. Commonwealth, 54 Va. App. 688, 699, 682 S.E.2d 71, 76 (2009).*

No statute provides for conviction of use of a firearm in the commission of an unlawful wounding. *Johnson, 20 Va. App. at 554, 458 S.E.2d at 602.*

Enhanced Punishment: The underlying indictment need not state that the offense charged is a second or subsequent offense. *Ansell, 219 Va. at 762, 250 S.E.2d at 762.* The enhanced punishment applies after the first finding of guilty even though the use of the firearm was on one occasion:

> The enhanced punishment provided by the statute is not geared to whether an accused has committed one or more acts. Instead, it is geared to the number of actual convictions suffered by an accused. Where several convictions result from

the same act, each conviction is separate and distinct from the other. It is the identity of the offense and not of the act which is dispositive.

Flythe, 221 Va. at 835, 275 S.E.2d at 584.

Principal in the Second Degree: *Cortner, 222 Va. at 562–63, 281 S.E.2d at 911*, and *Carter, 232 Va. at 125–27, 348 S.E.2d at 267–68*, hold that Va. Code Ann. § 18.2-53.1 applies to a principal in the second degree. Where the defendant is acting in concert with the gunman to commit the underlying felony, here abduction as a principal in the second degree, it is not necessary for the defendant to physically possess a firearm to be convicted under Va. Code Ann. § 18.2-53.1. *Carr v. Commonwealth, 69 Va. App. 106, 120–21, 816 S.E.2d 591, 599 (2018).*

A defendant may be found guilty of use of a firearm during the commission of a felony as a principal in the second degree notwithstanding that the principal in the first degree was acquitted in an earlier, separate trial. *Ferrell v. Commonwealth, 62 Va. App. 142, 150, 743 S.E.2d 284, 288 (2013).*

"Use" of a Firearm: When the defendant is charged with the "use" of a firearm, the Commonwealth does not need to prove that the victim perceived the weapon as a firearm. *Rose, 53 Va. App. at 516, 673 S.E.2d at 494.* It is only when the defendant is charged with displaying a firearm in a threatening manner that the prosecution must prove that the victim believed the weapon used was a firearm. *Id.*

Clubbing the victim with a gun constitutes a "use" of the firearm under the statute. *Id.*

Burglary Cases: Burglary and related offenses, including enhanced punishments where the defendant is in possession of a deadly weapon at the time the offense is committed, are set out in Va. Code Ann. § 18.2-89, *et seq.*

Where the defendant is charged with the use or display of a firearm while committing a burglary, the use or display of the firearm after the unlawful entry is not sufficient to prove this offense. The use or display of the firearm must be during a burglary, not before or after. *Rowland, 281 Va. at 401, 707 S.E.2d at 334*; *Smith v. Commonwealth, 61 Va. App. 690, 739 S.E.2d 280 (2013).*

The burglary described in Va. Code Ann. § 18.2-53.1 is not limited to common law burglary. *Rashad v. Commonwealth, 50 Va. App. 528, 541, 651 S.E.2d 407, 414 (2007).*

Lesser-included Offenses: Brandishing a firearm in violation Va. Code Ann. § 18.2-282 is not a lesser included offense of use of a firearm in the commission of certain felonies under Va. Code Ann. § 18.2-53.1. *Dezfuli v. Commonwealth, 58 Va. App. 1, 12, 707 S.E.2d 1, 6 (2011).*

ALERTS:

• A juvenile convicted of this crime cannot be sentenced to a juvenile disposition under Va. Code Ann. § 16.1-272, but must be given the mandatory three-year sentence. *Brown v. Commonwealth, 279 Va. 210, 224, 668 S.E.2d 185, 193 (2010).*

• Va. Code Ann. § 18.2-53.1 is an anomaly because it neither assigns a particular

Class of felony nor specifies a range of punishment. The three year term is both the mandatory minimum and the mandatory maximum for a first offense. *Graves, 294 Va. at 208, 805 S.E.2d at 232*; see also *Hines, 59 Va. App. at 582, 721 S.E.2d at 799* (a trial court may sentence a defendant only to a mandatory term of imprisonment of 3 years for a first offense, or a mandatory term of imprisonment of 5 years for a second or subsequent conviction).

• The penalty is five (5) years for a second or subsequent conviction. The instruction should contain, when appropriate, a third element requiring the Commonwealth to prove that the offense currently being tried is a second or subsequent one. To determine when a prior conviction may be used to enhance the penalty in a given case, see *Batts, 30 Va. App. at 12, 515 S.E.2d at 313.*

• Va. Code Ann. § 18.2-53.1 provides that sentences imposed for a violation of the statute must run consecutively with any punishment for the primary felony. Sentences imposed under this section cannot be suspended. Va. Code Ann. § 18.2-12.1. However, sentences for multiple convictions for use of a firearm may run concurrently with each other. *Brown v. Commonwealth, 284 Va. 538, 545, 733 S.E.2d 638, 641–42 (2012).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Clerk of Felony and Misdemeanor Cases, a range of punishment. The three year term is both the statutory maximum and the statutory minimum. [illegible] 295 S.E.2d at 632; see also *Hines*, 24 Va. App. at 203, 481 S.E.2d at 795 (a trial court may sentence a defendant only to a mandatory term of imprisonment in a second or subsequent conviction).

[illegible] § 18.2-12.1. However, sentences for multiple convictions for use of a firearm may run concurrently with each other. *Brown v. Commonwealth*, 264 Va. 518, 569 S.E.2d 693, 694–95 (2002).

RESEARCH REFERENCES

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE. Weapons §§ 1–4.1, 8, 9, 12, 13.

Instruction No. 18.702

Definition of Firearm—Use of Firearm in Felony

A firearm is any instrument that is capable of expelling a projectile by force or gunpowder. A firearm is also an object that is not capable of expelling a projectile by force or gunpowder but gives the appearance of being able to do so.

The existence of a firearm may be proved by circumstantial evidence, direct evidence, or both.

SOURCES & AUTHORITY

GOVERNING STATUTES:

See Va. Code Ann. § 18.2-53.1.

CASE AUTHORITY:

Barney v. Commonwealth, 69 Va. App. 604, 613–14, 822 S.E.2d 368, 373 (2019); Startin v. Commonwealth, 281 Va. 374, 382–383, 706 S.E.2d 873, 879 (2011); Armstrong v. Commonwealth, 263 Va. 573, 578, 562 S.E.2d 139, 142 (2002); Thomas v. Commonwealth, 25 Va. App. 681, 685, 492 S.E.2d 460, 462 (1997); McBride v. Commonwealth, 24 Va. App. 603, 605–08, 484 S.E.2d 165, 167–68 (1997); Miller v. Commonwealth, 23 Va. App. 208, 211–13, 475 S.E.2d 828, 829–30 (1996); Byers v. Commonwealth, 23 Va. App. 146, 150–53, 474 S.E.2d 852, 854–56 (1996); Elmore v. Commonwealth, 22 Va. App. 424, 428–30, 470 S.E.2d 588, 589–90 (1996); Wilson v. Commonwealth, 19 Va. App. 535, 536–37, 452 S.E.2d 884, 884–85 (1995); Yarborough v. Commonwealth, 247 Va. 215, 217–19, 441 S.E.2d 342, 343–44 (1994); Timmons v. Commonwealth, 15 Va. App. 196, 200, 421 S.E.2d 894, 897 (1992); Rogers v. Commonwealth, 14 Va. App. 774, 778, 418 S.E.2d 727, 729 (1992); Holloman v. Commonwealth, 221 Va. 196, 198–99, 269 S.E.2d 356, 357–58 (1980); Cox v. Commonwealth, 218 Va. 689, 690–91, 240 S.E.2d 524, 525–26 (1978); Johnson v. Commonwealth, 209 Va. 291, 296, 163 S.E.2d 570, 574 (1968).

PRACTICE COMMENTARY: The definition of firearm under Va. Code Ann. § 18.2-53.1 (for use or display of a firearm during the commission of a felony) is broadly construed and includes any instrument that gives the appearance of being a firearm. *Startin, 281 Va. at 382, 706 S.E.2d at 879*; *Barney, 69 Va. App. at 613–14, 822 S.E.2d at 373*.

A replica of a firearm that gives the appearance of being able to expel a projectile by force or gunpowder is a firearm. *Startin, 281 Va. at 382–83, 706 S.E.2d at 879 (affirming Startin v. Commonwealth, 56 Va. App. 26, 690 S.E.2d 310 (2010))*.

In *Holloman, 221 Va. at 198, 269 S.E.2d at 357*, a weapon, looking like a .45 pistol but which fired only BBs by force of a spring, was held to be a firearm in a prosecution for using a firearm in committing rape. The definition in this instruction was derived from *Holloman. Id. at 199, 269 S.E.2d at 358.*

In *Cox, 218 Va. at 690–91, 240 S.E.2d at 525–26*, a pistol, loaded with wooden bullets, was held to be a deadly weapon in a prosecution for entering a bank armed with a deadly weapon, with intent to commit larceny.

In *Johnson, 209 Va. at 296, 163 S.E.2d at 574*, a blank pistol with a blocked barrel was considered a firearm in a charge of attempted robbery by presenting a firearm. See also *Startin v. Commonwealth, 281 Va. 374, 383, 706 S.E.2d 873, 879 (2011). Startin* effectively overrules *Sprouse v. Commonwealth, 19 Va. App. 548, 551–52, 453 S.E.2d 303, 305–06 (1995)*, which had held that an object the victim reasonably believed to be a firearm could never constitute a firearm under Va. Code Ann. § 18.2-53.1 unless it was in fact a firearm.

For a case upholding a conviction for possession of a firearm by circumstantial evidence, see *Powell v. Commonwealth, 268 Va. 233, 237, 602 S.E.2d 119, 121 (2004)* (affirming conviction under Va. Code Ann. § 18.2-53.1 even though no firearm was found).

A weapon is not excluded from the operation of the statute simply because a part is missing at the time it is seized. A weapon missing a clip which can be inserted on a moment's notice is a firearm within the meaning of Va. Code Ann. § 18.2-308.4. *Timmons, 15 Va. App. at 200, 421 S.E.2d at 897.* See also *Rogers, 14 Va. App. at 778, 418 S.E.2d at 729* (holding that a weapon missing a firing pin is still a firearm).

Va. Code Ann. §§ 18.2-282 and 18.2-308.2:2 each provide a different definition of firearm. The definition in Va. Code Ann. § 18.2-282 is for the crime of pointing or brandishing a firearm or an object similar in appearance. The definition in Va. Code Ann. § 18.2-308.2:2 is part of the comprehensive statute governing transfer of firearms.

For a discussion of definitions of a "firearm," see *Armstrong v. Commonwealth, 263 Va. at 578, 562 S.E.2d at 142.*

A witness cannot testify as to whether an instrument has the capacity to cause serious injury or death as this is the ultimate fact in issue and is within the exclusive province of the jury to resolve. *Justiss v. Commonwealth, 61 Va. App. 261, 274–75, 734 S.E.2d 699, 705–06 (2012).*

ALERTS:

• This instruction is intended only for use in cases involving a violation of Va. Code Ann. § 18.2-53.1. The instruction may not contain the correct definition of firearm as that term is used in other governing statutes. Do not use this instruction where the defendant is charged with possession of a firearm by a convicted felon (Va. Code Ann. § 18.2-308.4).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.705

Definition of Firearm—Used for Purposes of Intimidation

Where a victim reasonably perceived a threat or intimidation by a firearm, it is not necessary that the object in question was in fact a firearm.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-58, 18.2-58.1.

CASE AUTHORITY:

Barney v. Commonwealth, 69 Va. App. 604, 613–17, 822 S.E.2d 368, 373 (2019); Armstrong v. Commonwealth, 263 Va. 573, 578, 562 S.E.2d 139, 142 (2002); Yarborough v. Commonwealth, 247 Va. 215, 218, 441 S.E.2d 342, 344 (1994); Powell v. Commonwealth, 268 Va. 233, 602 S.E.2d 119 (2004); Johnson v. Commonwealth, 209 Va. 291, 296 163 S.E.2d 570, 574 (1968).

PRACTICE COMMENTARY: In crimes such as robbery, the victim's perception that the assailant is armed is sufficient to establish the necessary element of violence or intimidation. The Commonwealth need not prove that an actual firearm was used. See *Johnson, 209 Va. at 296, 163 S.E.2d at 574; Yarborough, 247 Va. at 218, 441 S.E.2d at 344.*

For a discussion of definitions of a "firearm", see *Armstrong, 263 Va. at 578, 562 S.E.2d at 142.*

ALERTS:

• This instruction should not be used where the charge is possession of a firearm by a convicted felon.

• This instruction should not be used where the charge is use or display of a firearm in committing a felony under Va. Code Ann. § 18.2-53.1; for such offenses, use Instruction No. 18-702. *Barney, 69 Va. App. at 613–14, 822 S.E.2d at 373.*

• Where it is undisputed that the object used was a firearm, this instruction should be unnecessary.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.710

Pointing or Brandishing Firearm or Object Similar in Appearance to a Firearm

The defendant is charged with the crime of [pointing; brandishing] [a firearm; an object similar in appearance to a firearm]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [pointed; brandished] [a firearm; an object similar in appearance to a firearm]**; and**

(2) **That the defendant did so in such a manner as to reasonably induce fear or apprehension of bodily harm in the mind of another person.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 18.179

Pointing or Brandishing Firearm or Object Similar in Appearance to a Firearm

The defendant is charged with the crime of [pointing; brandishing] a firearm; an object similar in appearance to a firearm; and

(1) That the defendant [pointed; brandished] a firearm; an object similar in appearance to a firearm; and

(2) That the defendant did so in such a manner as to [unnecessarily endanger the safety or apprehension of bodily harm in the mind of another person.

Instruction No. P18.710

Pointing or Brandishing Firearm or Object Similar in Appearance to a Firearm

You have found the defendant guilty of the crime of [pointing; brandishing] [a firearm; an object similar in appearance to a firearm].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-282.

CASE AUTHORITY:

Commonwealth v. Alexander, 260 Va. 238, 241, 531 S.E.2d 567, 568 (2000); Pike v. Commonwealth, 24 Va. App. 373, 375–76, 482 S.E.2d 839, 840 (1997); Delacruz v. Commonwealth, 11 Va. App. 335, 340, 398 S.E.2d 103, 106 (1990); Diffendal v. Commonwealth, 8 Va. App. 417, 420–23, 382 S.E.2d 24, 25–27 (1989); Kelsoe v. Commonwealth, 226 Va. 197, 199, 308 S.E.2d 104, 104 (1983).

PRACTICE COMMENTARY: In *Kelsoe, 226 Va. at 199, 308 S.E.2d at 104*, the court held that the defendant may be convicted of three violations of Va. Code Ann. § 18.2-282 where the defendant withdrew a pistol from his coat and pointed it at three people.

See Va. Code Ann. § 18.2-282(C) for a definition of firearm; note that this statutory definition differs from the statutory definition in Va. Code Ann. § 18.2-308.2:2 and from the definitions, based on case law, found in other instructions.

Brandishing a firearm in violation Va. Code. Ann. § 18.2-282 is not a lesser included offense of use of a firearm in the commission of certain felonies under Va. Code Ann. § 18.2-53.1. *Dezfuli v. Commonwealth, 58 Va. App 1, 12, 707 S.E.2d 1, 6 (2011).*

A deadly weapon may not be brandished solely in defense of personal property. *Alexander, 260 Va. at 241, 531 S.E.2d at 568.*

For a discussion of definitions of a "firearm," see *Armstrong v. Commonwealth, 263 Va. 573, 578, 562 S.E.2d 139, 142 (2002).*

If the crime occurs at or within 1,000 feet of a school, the crime is a Class 6 felony. Va. Code Ann. § 18.2-282(A). In such a case the instruction will need to be modified accordingly.

The victim need not experience fear or fright, but it is sufficient if the brandishing of the firearm created a reasonable apprehension of bodily harm in the victim. *Huffman v. Commonwealth, 51 Va. App. 469, 472–73, 658 S.E.2d 713, 714–15 (2008).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.750

Throwing Object From a Place Higher Than One Story

The defendant is charged with the crime of intentionally throwing [a; an] (name of object capable of causing injury to another person) **from a** [balcony; roof top; (name other place)] **more than one story above ground level with the intent to cause injury to another. The Commonwealth must prove beyond a reasonable doubt the following elements:**

(1) **That the defendant threw** [a; an] (name of object capable of causing injury to another person) **from a place more than one story above ground level; and**

(2) **That the defendant did so with the intent to cause injury to another person.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Throwing Object From a Place Higher Than One Story

The defendant is charged with the crime of intentionally throwing [a; an] (name of object capable of causing injury to another person) **from a** [balcony; roof top; (name of place) more than one story above ground level] in the future to cause injury, or annoyance. The Commonwealth must prove a reasonable doubt the following elements:

(1) That the defendant threw [a; an] (name of object capable of causing injury to another person) **from a place more than one story above ground level;**

(2) That the defendant did so with the intention to cause injury or annoyance;

(3) That [the victim; (name of person)] was [injured; annoyed].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt all the elements of the crime as charged, **then you shall find the** defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you are not [the Commonwealth has failed to prove beyond a reasonable doubt all the elements of the crime charged; you find the defendant

Instruction No. P18.750

Throwing an Object From a Place Higher Than One Story

You have found the defendant guilty of the crime of intent to cause injury to another person by throwing an object from a place higher than one story.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment of not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-51.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.810

Actual and Constructive Possession of Firearm—Definition

To knowingly and intentionally possess a firearm means that a person is aware of the presence and character of the firearm and has actual physical possession or constructive possession of it. Constructive possession means that the person has dominion and control over the firearm. Mere proximity is not enough.

Possession need not be exclusive; it may be shared with another. The length of time of the possession is not material.

Ownership or occupancy of the [premises; vehicle] **in which a firearm is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such firearm. Such ownership or occupancy is a fact which may be considered with other evidence.**

Possession may be proved by acts, declarations or conduct of the defendant from which it may be fairly inferred that he was aware of the presence and character of the firearm at the place found.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Rasberry v. Commonwealth, 71 Va. App. 19, 30-31, 833 S.E.2d 894, 899 (2019); Atkins v. Commonwealth, 57 Va. App. 2, 22–23, 698 S.E.2d 249, 259 (2010); Smallwood v. Commonwealth, 278 Va. 625, 630–31, 688 S.E.2d 154, 157 (2009); Bolden v. Commonwealth, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008); Rawls v. Commonwealth, 272 Va. 334, 349–51, 634 S.E.2d 697, 704–06 (2006); McDaniel v. Commonwealth, 264 Va. 429, 429–30, 574 S.E.2d 234, 234 (2002); Grier v. Commonwealth, 35 Va. App. 560, 570–71, 546 S.E.2d 743, 747–48 (2001); Hancock v. Commonwealth, 21 Va. App. 466, 468–72, 465 S.E.2d 138, 140–42 (1995); Logan v. Commonwealth, 19 Va. App. 437, 444–45, 452 S.E.2d 364, 368–69 (1994); Blake v. Commonwealth, 15 Va. App. 706, 707–09, 427 S.E.2d 219, 220–21 (1993); Jefferson v. Commonwealth, 14 Va. App. 77, 79 n.1, 414 S.E.2d 860, 861 n.1 (1992).

PRACTICE COMMENTARY: For a discussion of definitions of a "firearm," see *Armstrong v. Commonwealth, 263 Va. 573, 581–84, 562 S.E.2d 139, 144–45 (2002).*

The existence of the firearm may be proved by circumstantial evidence. *Powell v. Commonwealth, 268 Va. 233, 237, 602 S.E.2d 119, 121 (2004)* (affirming conviction under Va. Code Ann. § 18.2-53.1 even though no firearm was found).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.850

Deadly Weapon—Definition

A deadly weapon is any object or instrument, not part of the human body, that is likely to cause death or great bodily injury because of the manner and under the circumstances in which it is used.

Sources & Authority

Governing Statutes:

The following statutes govern offenses involving the use of a deadly weapon, and feature that language, but none of them defines "deadly weapon": Va. Code Ann. §§ 18.2-58, 18.2-89, 18.2-90, 18.2-91, 18.2-92, 18.2-93, 18.2-281, 18.2-405, 18.2-406.

Case Authority:

Lee v. Commonwealth, 68 Va. App. 313, 315, 808 S.E.2d 224, 226 (2017); Hampton v. Commonwealth, 34 Va. App. 412, 419–20, 542 S.E.2d 41, 45 (2001); Strickler v. Murray, 249 Va. 120, 129–30, 452 S.E.2d 648, 652–53 (1995); Pritchett v. Commonwealth, 219 Va. 927, 929, 252 S.E.2d 352, 353 (1979); Compton v. Commonwealth, 219 Va. 716, 730, 250 S.E.2d 749, 758 (1979); Cox v. Commonwealth, 218 Va. 689, 691, 240 S.E.2d 524, 526 (1978); Johnson v. Commonwealth, 209 Va. 291, 296, 163 S.E.2d 570, 574 (1968); Henry v. Commonwealth, 195 Va. 281, 287–88, 77 S.E.2d 863, 867 (1953); Floyd v. Commonwealth, 191 Va. 674, 683–84, 62 S.E.2d 6, 10 (1950); Pannill v. Commonwealth, 185 Va. 244, 253–54, 38 S.E.2d 457, 462 (1946); Jarrell v. Commonwealth, 132 Va. 551, 567–68, 110 S.E. 430, 435–36 (1922); Murphy v. Commonwealth, 64 Va. (23 Gratt.) 960, 972 (1873).

Practice Commentary: The court may declare that certain weapons, such as a dirk, an axe, or a loaded pistol are "deadly weapons" as a matter of law. *Floyd, 191 Va. at 683, 625 S.E.2d at 10.* However, if the court does not resolve the issue as a matter of law, then the jury must decide if a particular weapon should be classified as "deadly." Generally, a "deadly weapon" is one that is likely to produce death or great bodily injury. Nevertheless, when deciding the question of "deadliness," the manner in which the weapon is used is often more important than its inherent characteristics and capabilities. *Floyd, 191 Va. at 684, 62 S.E.2d at 10.* "Generally unless a weapon is per se a deadly one, the fact finder should determine whether it, and the manner of its use, place it in that category, and the burden of showing these things is upon the Commonwealth." *Pritchett, 219 Va. at 929, 252 S.E.2d at 353.* "The mere fact that death was produced by the weapon does not establish its character as deadly." *Pannill, 185 Va. at 253–54, 38 S.E.2d at 462.*

An automobile, wrongfully used, may be a deadly weapon. *Coles v. Commonwealth, 270 Va. 585, 590, 621 S.E.2d 109, 111 (2005); Essex v. Commonwealth, 228 Va. 273, 281, 322 S.E.2d 216, 220 (1984).*

Body parts, fists and feet, are not deadly weapons, but malice may be inferred from the severity of a beating inflicted with body parts only. *Roark v. Commonwealth, 182 Va. 244, 250, 28 S.E.2d 693, 695 (1944).*

Sidewalk curb used to bash victim's head is a deadly weapon. *Hampton, 34 Va. App. at 419–20, 542 S.E.2d at 45.*

A screwdriver can be considered a dangerous weapon based upon the possess-

or's intent and use in the commission of a burglary. *Lee, 68 Va. App. at 315, 808 S.E.2d at 226.*

A witness cannot testify as to whether an instrument has the capacity to cause serious injury or death as this is the ultimate fact in issue and is within the exclusive province of the jury to resolve. *Justiss v. Commonwealth, 61 Va. App. 261, 274–75, 734 S.E.2d 699, 705–06 (2012).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.900

Use or Attempted Use of Restricted Ammunition in Committing or Attempting to Commit Crime

The defendant is charged with the crime of using or attempting to use restricted firearm ammunition while committing or attempting to commit (name of crime). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant used or attempted to use types of ammunition that are** [coated with or contain in whole or in part polytetrafluorethylene or a similar product; commonly known as "KTW" bullets or "French Arcanes"; cartridges containing bullets coated with a plastic substance with other than lead or lead alloy cores; cartridges of which the bullet itself is wholly comprised of a metal or metal alloy other than lead]; **and**

(2) **That the use or attempted use was while committing or attempting to commit** (name of crime)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.900

Use or Attempted Use of Restricted Ammunition in Committing or Attempting to Commit Crime

You have found the defendant guilty of the crime of using or attempting to use restricted firearm ammunition while committing or attempting to commit (name of crime)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-308.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Expressly excluded from the statutory definition of "restricted firearm ammunition" are shotgun shells and solid plastic bullets. Va. Code Ann. § 18.2-308.3(A).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.910

Pointing or Brandishing a Machete or Other Bladed Weapon

The defendant is charged with the crime of [pointing; holding; brandishing] [a machete; a weapon with an exposed blade 12 inches in length or longer] **with the intent of intimidating** [a person; a group of persons]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [pointed; held; brandished] [a machete; a weapon with an exposed blade 12 inches in length or longer]**; and**

(2) That the defendant did so with the intent of intimidating [a person; a group of persons]**; and**

(3) That the defendant did so in a manner that reasonably demonstrates that intent.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any or all of the elements of the crime, then you shall find the defendant not guilty.

Shooting or Wounding a Mayor or Other Elected Official

The defendant is charged with the crime of [shooting/wounding] [a/an] [mayor/governor/lieutenant governor/member of the General Assembly] with the purpose to [assassinate/kill/injure] a person [or group of persons]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the victim [was/was not] [a/an] [mayor/governor/lieutenant governor/member of the General Assembly] [or group of persons]; and

(2) That the defendant did so with the purpose to [assassinate/kill/injure] [a/an] [mayor/governor/lieutenant governor/member of the General Assembly] [or group of persons]; and

(3) That the defendant did so in a manner that reasonably [endangered/put] other persons.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the [three] elements of the crime [as charged/that I have described to you], then you shall find the defendant guilty [of that crime].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any or all of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.910

Pointing or Brandishing a Machete or Other Bladed Weapon

You have found the defendant guilty of the crime of [pointing; holding; brandishing] [a machete; a weapon with an exposed blade 12 inches in length or longer].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-282.1.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: If the crime occurs at a school or on public property within 1,000 feet of such school, the crime is a Class 6 felony. Va. Code Ann. § 18.2-282.1. In such a case, the instruction will need to be modified accordingly.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.920

Reckless Handling of a Firearm—Misdemeanor

The defendant is charged with the crime of reckless handling of a firearm so as to endanger the life, limb, or property of any person. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) The defendant recklessly handled a firearm; and

(2) The life, limb, or property of a person was endangered.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.920

Reckless Handling of a Firearm—Misdemeanor

You have found the defendant guilty of the crime of reckless handling of a firearm.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-56.1.

CASE AUTHORITY:

Jones v. Commonwealth, 65 Va. App. 274, 277–80, 777 S.E.2d 229, 230–31 (2015); *Mangano v. Commonwealth, 44 Va. App. 210, 216–17, 604 S.E.2d 118, 121–22 (2004).*

PRACTICE COMMENTARY: The term "firearm" is not defined in Va. Code Ann. § 18.2-56.1. "Firearm" has been defined by the courts differently, depending on the particular statute involved. In *Jones*, the Court of Appeals held that the definition of "firearm" under Va. Code Ann. § 18.2-56.1 is the same definition that applies to Va. Code Ann. § 18.2-308.2 (possession or transportation of firearms, etc. by convicted felons). An object is a "firearm," for purposes of Va. Code Ann. § 18.2-56.1 and Va. Code Ann. § 18.2-308.2, if it is "an instrument designed, made, and intended to expel a projectile by means of an explosion." *Jones, 65 Va. at 278; 777 S.E.2d at 230.*

Va. Code Ann. § 18.2-56.2 establishes misdemeanor offenses for allowing children to have access to firearms.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.930

Reckless Handling of a Firearm—Felony

The Defendant is charged with the crime of reckless handling of a firearm in a manner so gross, wanton and culpable as to show a reckless disregard for human life and causing serious bodily injury of another person resulting in permanent and significant impairment. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) The defendant handled a firearm in a manner so gross, wanton and culpable as to show a reckless disregard for human life; and

(2) The defendant caused serious bodily injury of another person resulting in permanent and significant physical impairment.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of felonious reckless handling of a firearm[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the evidence that the Commonwealth has not proved either element above, but you find that the Commonwealth has proven beyond a reasonable doubt that

(1) The defendant recklessly handled a firearm; and

(2) The life, limb, or property of a person was endangered,

then you shall find the defendant guilty of reckless handling of a firearm[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove either or both of the elements of the crime, then you shall find the defendant not guilty.

Reckless Handling of a Firearm—Felony

The Defendant is charged with the crime of reckless handling of a firearm in a manner to [endanger, injure and/or injure a bystander/property]. In order for you to find the Defendant guilty of reckless handling of a firearm, the Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) The Defendant handled a firearm in a manner to endanger, injure and/or injure a bystander/property;

(2) The Defendant's handling of the firearm was reckless disregard for human life; and

(3) The Defendant's conduct was the proximate cause of the [endangerment, injury and/or injury to a bystander/property].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the Defendant guilty.

If you find from the evidence that the Commonwealth has not proved either element above, but you find that the Commonwealth has proved beyond a reasonable doubt that

(1) The defendant recklessly handled a firearm; and

(2) The life, limb, or property of a person was endangered,

[you shall find the Defendant guilty of reckless handling of a firearm] but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P18.930

Reckless Handling of a Firearm—Felony

You have found the defendant guilty of the crime of felonious reckless handling of a firearm.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-56.1.

CASE AUTHORITY:

Jones v. Commonwealth, 65 Va. App. 274, 277–80, 777 S.E.2d 229, 230–31 (2015).

PRACTICE COMMENTARY: The term "firearm" is not defined in Va. Code Ann. § 18.2-56.1. "Firearm" has been defined by the courts differently, depending on the particular statute involved. In *Jones*, the Court of Appeals held that the definition of "firearm" under Va. Code Ann. § 18.2-56.1 is the same definition that applies to Va. Code Ann. § 18.2-308.2 (possession or transportation of firearms, etc. by convicted felons). An object is a "firearm," for purposes of Va. Code Ann. § 18.2-56.1 and Va. Code Ann. § 18.2-308.2, if it is "an instrument designed, made, and intended to expel a projectile by means of an explosion." *Jones, 65 Va. at 278, 777 S.E.2d at 230.*

For a punishment phase instruction concerning the reckless handling of a firearm, see Instruction No. P18.920.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

Instruction No. 18.940

Definition of Firearm—Reckless Handling of a Firearm

A firearm is an instrument designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-56.1.

CASE AUTHORITY:

Jones v. Commonwealth, 65 Va. App. 274, 278, 777 S.E.2d 229, 230 (2015).

PRACTICE COMMENTARY: The term "firearm" is not defined in Va. Code Ann. § 18.2-56.1. "Firearm" has been defined by the courts differently, depending on the particular statute involved. In *Jones*, the Court of Appeals held that the definition of "firearm" under Va. Code Ann. § 18.2-56.1 is the same definition that applies to Va. Code Ann. § 18.2-308.2 (possession or transportation of firearms, etc. by convicted felons). An object is a "firearm," for purposes of Va. Code Ann. § 18.2-56.1 and Va. Code Ann. § 18.2-308.2, if it is "an instrument designed, made, and intended to expel a projectile by means of an explosion." *Jones, 65 Va. at 278, 777 S.E.2d at 230.*

For a punishment phase instruction concerning the reckless handling of a firearm, see Instruction No. P18.920.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1–22.5

MICHIE'S JURISPRUDENCE, Weapons §§ 1–4.1, 8, 9, 12, 13

CHAPTER 19

DEER KILLING AT NIGHT BY LIGHT

Scope Note

Instruction No. 19.100 Killing Deer at Night by Light—General

Instruction No. 19.200 Killing Deer at Night by Light—Attempt

SCOPE NOTE

These instructions are based on the crime known as "jacklighting" or "spot-lighting" deer. This offense occurs when a hunter drives his car along the road and shines a light across a field until he discovers the eyes of a deer. The animal becomes mesmerized by the light, and is thus easily shot. See *Wilson v. Commonwealth, 225 Va. 33, 38, 301 S.E.2d 1, 3 (1983)*; *Yeatts v. Minton, 211 Va. 402, 403 n.1, 177 S.E.2d 646, 647 n.1 (1970)* (quoting *Stephens v. Lindsey, 304 F. Supp. 203, 204 (S.D. Ga. 1969)*).

Instruction Nos. 19.100 and 19.200 are drawn from Va. Code Ann. § 29.1-523. Instruction No. 19.100 defines the substantive offense. Instruction No. 19.200 addresses the permissive inference of an attempt to kill such an animal, which arises when the defendant flashes a light from his vehicle between one half hour after sunset and one half hour before sunrise the following day, while he is in possession of a weapon that is commonly used to hunt deer. See *Wilson v. Commonwealth, 225 Va. 33, at 42–43, 301 S.E.2d at 6 (1983)* (decided under an older version of the same statute).

There are no instructions for two other statutory provisions which relate to this offense: the forfeiture of any vehicles and weapons used in the commission of the offense (Va. Code Ann. § 29.1-524) and the employment of lights by drivers who are passing through areas which are used by deer (Va. Code Ann. § 29.1-525). In cases that involve either or both of these two issues, the proper instructions can be prepared by using the appropriate statutory language.

In *Wilson v. Commonwealth*, the Supreme Court of Virginia also discussed the liability of accessories in connection with the deer-killing statute. See *225 Va. 33, at 43–44, 301 S.E.2d 1, at 6–7 (1983)*.

Instruction No. 19.100

Killing Deer at Night by Light—General

The defendant is charged with the crime of killing a deer at night by light. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed a deer; and

(2) That he did so between one half hour after sunset on any day and one half hour before sunrise the following day; and

(3) That he did so by use of a [light attached to any vehicle; spotlight; flashlight].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty and fix his punishment at:

(1) Confinement in jail for a specific time, but not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000; or

(3) Confinement in jail for a specific time, but not more than six (6) months, and a fine of a specific amount, but not more than $1,000.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 29.1-523.

CASE AUTHORITY:

Wilson v. Commonwealth, 225 Va. 33, 39–44, 301 S.E.2d 1, 4–7 (1983); Yeatts v. Minton, 211 Va. 402, 402–06, 177 S.E.2d 646, 647–49 (1970).

PRACTICE COMMENTARY: The Supreme Court of Virginia held in *Wilson v. Commonwealth* that the presumption of guilt in Va. Code Ann. § 29.1-523 is rebuttable and is to be analyzed as a permissible inference, "even if it is construed to require the defendants to produce some evidence of 'good cause' " (for flashing the light). The Court further held that the permissive inference was not unconstitutionally applied in that case. *Wilson, 225 Va. at 42, 301 S.E.2d at 5.*

☞ ***PRACTICE POINTER:***

In *Wilson v. Commonwealth*, the Supreme Court of Virginia also discussed the liability of accessories in connection with the deer-killing statute. See *225 Va. at 43–44, 301 S.E.2d at 6–7.*

☞ ***PRACTICE POINTER:***

Yeatts and *Wilson* were decided under former Va. Code Ann. § 29-144.2, which is substantially similar to Va. Code Ann. § 29.1-523.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Game Laws"

MICHIE'S JURISPRUDENCE, Game and Game Laws § 2

Instruction No. 19.200

Killing Deer at Night by Light—Attempt

The defendant is charged with the crime of attempting to kill a deer at night by light. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant attempted to kill a deer; and

(2) That he did so between one half hour after sunset on any day and one half hour before sunrise the following day; and

(3) That he did so by use of a [light attached to any vehicle; spotlight; flashlight]**.**

If you find from the evidence that, without good cause, there was a flashing of a [light attached to any vehicle; spotlight; flashlight] **from any vehicle between one half hour after sunset on any day and one half hour before sunrise the following day by any person who was then in possession of a** [firearm; crossbow; bow and arrow; speargun], **then you may infer that the defendant attempted to kill a deer, unless, from all of the evidence, you have a reasonable doubt as to whether the defendant attempted to kill a deer.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty and fix his punishment at:

(1) Confinement in jail for a specific time, but not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000; or

(3) Confinement in jail for a specific time, but not more than six (6) months, and a fine of a specific amount, but not more than $1,000.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 29.1-523.

CASE AUTHORITY:

Wilson v. Commonwealth, 225 Va. 33, 39–44, 301 S.E.2d 1, 4–7 (1983); Yeatts v. Minton, 211 Va. 402, 402–06, 177 S.E.2d 646, 647–49 (1970).

PRACTICE COMMENTARY: Although Va. Code Ann. § 29.1-523 speaks of a rebuttable presumption, or what the Court in *Wilson* treated it as a "permissive inference," of an attempt to kill deer from the fact that a defendant flashed a light, at night, and had a firearm in his actual or constructive presence. *225 Va. at 42, 301 S.E.2d at 5*. This inference, held constitutional in *Wilson*, shifts to the defendant the burden of producing mitigating or exculpatory evidence to show he flashed the light with good cause while in possession of a firearm.

The definition of "firearm," if necessary, is not provided. A review of Instruction Nos. 18.615, 18.616, 18.622, 18.702, and 18.705 may be instructive.

☞ ***PRACTICE POINTER:***

In *Wilson v. Commonwealth*, the Supreme Court of Virginia also discussed the liability of accessories in connection with the deer-killing statute. See *225 Va. at 43–44, 301 S.E.2d at 6–7*.

☞ ***PRACTICE POINTER:***

Wilson and *Yeatts* were decided under former Va. Code Ann. § 29-144.2, which is substantially similar to Va. Code Ann. § 29.1-523.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Game Laws"

MICHIE'S JURISPRUDENCE, Game and Game Laws § 2

CHAPTER 20

DISORDERLY CONDUCT

Scope Note

Instruction No. 20.100 Disorderly Conduct

Instruction No. P20.100 Disorderly Conduct

SCOPE NOTE

For cases commonly cited in this area and which provide the broad basis of analysis for freedom of speech cases in the public forum, see generally: *Virginia v. Black, 538 U.S. 343 (2003)* (cross-burning); *R.A.V. v. City of St. Paul, Minn.* 505 U.S. 377 (1992) (cross-burning); *Texas v. Johnson,* 491 U.S. 397 (1989) (desecration of the flag); *City of Houston, Tex. v. Hill,* 482 U.S. 451 (1987) (interfering with the work of law enforcement officers); *Kolender v. Lawson, 461 U.S. 352 (1983)* (loitering); *Carey v. Brown,* 447 U.S. 455 (1980) (picketing); *Lewis v. City of New Orleans, 415 U.S. 130 (1974)* (wantonly cursing and using obscene language); *Hess v. Indiana, 414 U.S. 105 (1973)* (speech at an antiwar demonstration); *Norwell v. City of Cincinnati, Ohio, 414 U.S. 14 (1973)* (verbally protesting police treatment); *Plummer v. City of Columbus, Ohio, 414 U.S. 2 (1973)* (fighting words); *Grayned v. City of Rockford, 408 U.S. 104 (1972)* (antiwar demonstrations); *Colten v. Kentucky, 407 U.S. 104 (1972)* (congregating with others and refusing to comply with a lawful order to disperse); *Gooding v. Wilson, 405 U.S. 518 (1972)* (speaking opprobrious words or abusive language to another tending to cause a breach of the peace); *Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)* (statute regulating among others, disorderly persons and vagabonds); *Cohen v. California, 403 U.S. 15 (1971)* (maliciously and willfully disturbing the peace by offensive conduct); *Coates v. City of Cincinnati, 402 U.S. 611 (1971)* (illegal for three or more persons to assemble on sidewalks and conduct themselves in a manner annoying to persons passing by).

Instruction No. 20.100

Disorderly Conduct

Guilt Phase:

The defendant is charged with the crime of disorderly conduct. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the conduct of the defendant occurred** [in a public place; in a street; in a highway; in a public building; while in or on a public conveyance]**; and**

(2) **That the conduct of the defendant had a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct was directed; and**

(3) **That the defendant intended to cause public** [inconvenience; annoyance; alarm] **or recklessly created a risk thereof.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P20.100

Disorderly Conduct

You have found the defendant guilty of the crime of disorderly conduct.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific term, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific term, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-415.

PRINCIPAL CASE AUTHORITY:

Howard v. Commonwealth, 277 Va. 184, 189–92, 671 S.E.2d 156, 156, 158–60 (2009); Battle v. Commonwealth, 50 Va. App. 135, 138–39, 647 S.E.2d 499, 500–01 (2007); Mercer v. Winston, 214 Va. 281, 284, 199 S.E.2d 724, 726 (1973).

OTHER RELEVANT DECISIONS:

Mannix v. Commonwealth, 31 Va. App. 271, 278–80, 522 S.E.2d 885, 889 (2000); Marttila v. City of Lynchburg, 33 Va. App. 592, 598–03, 535 S.E.2d 693, 696–99 (2000); Smith v. Commonwealth, 30 Va. App. 737, 741, 519 S.E.2d 831, 832–33 (1999); Ford v. City of Newport News, 23 Va. App. 137, 142–46, 474 S.E.2d 848, 850–52 (1996); Keyes v. City of Virginia Beach, 16 Va. App. 198, 199–200, 428 S.E.2d 766, 767–68 (1993); Burgess v. City of Virginia Beach, 9 Va. App. 163, 166–67, 385 S.E.2d 59, 60–61 (1989); Colten v. Kentucky, 407 U.S. 104, 105–10 (1972); Cohen v. California, 403 U.S. 15, 23 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942); Cantwell v. State of Connecticut, 310 U.S. 296, 309 (1940).

PRACTICE COMMENTARY: The prohibited conduct under Va. Code Ann. § 18.2-415 "shall not be deemed to include the utterance or display of any words or to include conduct otherwise made punishable under this title." This constitutes an affirmative defense rather than a separate element of the offense. It applies only when a rational fact finder could find the defendant guilty beyond a reasonable doubt of conduct prohibited under Title 18.2. *Battle, 50 Va. App. at 139–41, 647 S.E.2d at 501–02.*

Fighting Words and Vulgarity. A statute seeking to regulate what is broadly termed offensive speech will stand only if that statute, in the words of *Chaplinsky*, is so narrowly drawn as to be limited to "fighting words." See *315 U.S. at 572.*

Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky, 315 U.S. at 572.* The words must be "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen, 403 U.S. at 20.* In order to be personally abusive the words must be "directed to the person of the hearer" in the sense that they are a face to face personal insult. *Cantwell, 310 U.S. at 308*; see *Colten, 407 U.S. at 108–11* (upholding a Kentucky disorderly conduct statute requiring "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof"). In *Burgess*, the Court of Appeals of Virginia declared a Virginia Beach City Ordinance unconstitutional for having a broader scope than fighting words. That ordinance provided "if any person profanely curses or swears or be drunk in public,

he shall be guilty of a . . . misdemeanor." *9 Va. App. at 165, 385 S.E.2d at 60.*

"[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make a single four-letter expletive a criminal offense." *Cohen, 403 U.S. at 26.* Thus "so long as the means are peaceful, the communication need not meet standards of acceptability." *Organization for a Better Austin, 402 U.S. at 419.* But see Va. Code Ann. § 18.2-416 ("If any person shall, in the presence of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor."); see also *Mercer, 214 Va. at 284, 199 S.E.2d at 726* (holding that Va. Code Ann. § 18.2-416 is constitutional if its scope is limited to "fighting words").

☞ ***PRACTICE POINTER*:**

None.

! ***ALERTS*:**

• Va. Code Ann. § 18.2-415 also proscribes the disruption of a funeral or memorial service or disruption of school or school sponsored activities and other meetings of governing bodies of political subdivisions, literary societies or places of religious worship, when such disruptions are either willful or done while intoxicated (whether willful or not). The instruction should be revised accordingly when such circumstances exist.

• Since disorderly conduct is commonly prohibited by local, municipal, or county ordinances, it is wise to check such ordinances also. See, for example, *Howard, 277 Va. at 185, 189–92, 671 S.E.2d at 156, 158–60* (disorderly conduct based on Roanoke City Code § 21-9(a)(2)).

Va. Code Ann. § 18.2-415(D) contains the following exception:

The provisions of this section shall not apply to any elementary or secondary school student if the disorderly conduct occurred on the property of any elementary or secondary school, on a school bus as defined in Va. Code Ann. § 46.2-100, or at any activity conducted or sponsored by any elementary or secondary school.

Please note that the statute is not by its plain terms limited to juveniles.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"

John L. Costello & Craig. S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.11, 27.8

MICHIE'S JURISPRUDENCE, Disorderly Conduct §§ 1–2

CHAPTER 21

DRIVING WHILE UNDER THE INFLUENCE

Scope Note

Instruction No. 21.100 Driving While Under the Influence of Alcohol and/or Drugs (Including "Per Se" Offenses)

Instruction No. P21.100 Driving While Under the Influence of Alcohol and/or Drugs (Including "Per Se" Offenses)

Instruction No. 21.110 Person Under Age 21 Operating Motor Vehicle After Illegally Consuming Alcohol

Instruction No. P21.110 Person Under Age 21 Operating Motor Vehicle After Illegally Consuming Alcohol

Instruction No. 21.150 Maiming—Under the Influence

Instruction No. P21.150 Maiming—Under the Influence

Instruction No. 21.200 Under Influence of Alcohol—Definition

Instruction No. 21.210 Serious Bodily Injury—Definition

Instruction No. 21.250 Operating—Definition

Instruction No. 21.300 Alcohol Concentration—0.05 or Less

Instruction No. 21.320 Alcohol Concentration—0.08 or More

Instruction No. 21.340 Alcohol Concentration—More Than 0.05 But Less Than 0.08

Instruction No. 21.350 Drug Concentration—Not "Per Se" Offense

Instruction No. 21.360 Alcohol Concentration—0.08 or More "Per Se" Offense

Instruction No. 21.370 Drug Concentration—"Per Se" Offense

Instruction No. 21.400 Refusal to Submit to Blood or Breath Test

Instruction No. 21.425 Evidence of Refusal to Submit to Blood or Breath Test

Instruction No. 21.450 Consent to Blood or Breath Test

SCOPE NOTE

These instructions cover the principal issues in regard to driving or operating a motor vehicle while having a blood alcohol concentration of 0.08 or more or while under the influence of alcohol and/or drugs or while having a blood concentration equal to or greater than a specified measure of designated controlled substances.

Instruction No. 21.100, based on Va. Code Ann. §§ 18.2-266 and 18.2-270, covers the basic elements of the crime of driving while having a blood alcohol concentration of 0.08 or more or a concentration of 0.08 grams or more of alcohol per 210 liters of breath or while under the influence of alcohol, drugs or a combination of alcohol and drugs or while having a blood concentration equal to or greater than a specified measure of designated controlled substances.

Instruction No. 21.110, based on Va. Code Ann. § 18.2-266.1, covers the crime of a person under the age of twenty-one (21) driving after illegally consuming alcohol.

Instruction No. 21.150, based on Va. Code Ann. § 18.2-51.4, covers the crime of maiming another as a result of driving under the influence.

Instruction No. 21.200, based on Va. Code Ann. § 4.1-100, uses the statutory definition of "intoxicated" to define "under the influence of alcohol."

Instruction No. 21.210, based upon Va. Code Ann. § 18.2-51.4 (E) defines the term "serious bodily injury."

Instruction No. 21.250 offers a definition of "operating" a motor vehicle that is derived from the case law on this subject.

Instruction Nos. 21.300 to 21.350 cover the statutory presumptions or inferences that arise from the alcohol or drug content of a defendant's blood, as set out in Va. Code Ann. § 18.2-269.

Instruction No. 21.300 provides that a driver with a blood alcohol concentration of 0.05 benefits from the rebuttable presumption that he or she is presumed not to be under the influence of alcohol.

Instruction No. 21.340 applies to situations where a defendant has a blood alcohol concentration between 0.05 and 0.08. It provides that there is no presumption or inference of intoxication, but the test result may be considered with other evidence in determining whether the defendant was intoxicated.

Instruction No. 21.360, based on Va. Code Ann. § 18.2-266(i), is applicable to charges of driving while having "per se" 0.08 or more measured blood alcohol concentration.

Instruction No. 21.370, based on Va. Code Ann. § 18.2-266(v), is applicable to charges of driving while having "per se" blood concentration equal to or greater than a specified measure of designated controlled substances. Instruction No. 21.350 is applicable to non "per se" offenses.

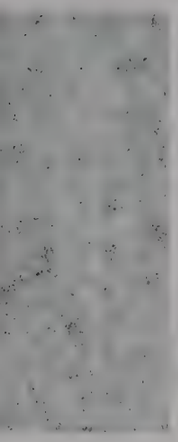
Instruction Nos. 21.400 and 21.450 deal with refusing to take a blood or breath test, a crime that is covered by Va. Code Ann. § 18.2-268.3. Instruction No. 21.400 spells out the elements of the offense. Instruction No. 21.450 covers the issue of whether the defendant's refusal to take the test was reasonable under the circumstances of the case.

Rebuttable Presumption as Permissive Inference. Virginia statutes and cases have used the term "rebuttable presumption" in the DUI context. However, the United States Supreme Court has held that rebuttable presumptions which shift the burden of proof to the defendant in a

criminal case violate Due Process. *Mullaney v. Wilbur, 421 U.S. 684, 701–04 (1975)*; *Francis v. Franklin, 471 U.S. 307, 314 (1985)*. The Court has instead approved the use of "permissive inferences" that a factfinder may, but is not required, to draw from proven facts. *Ulster County Court v. Allen, 442 U.S. 140, 157 (1979)*; see also *Francis, 471 U.S. at 314–15*. The Court has also intimated that presumptions which merely shift the burden of production are permissible. See *Allen, 442 U.S. at 158 n.16*; *Patterson v. New York, 432 U.S 197, 230–32 (1977)* (Powell, J. dissenting); *Mullaney, 421 U.S. at 701 n.28, 702 n.30*. Presumptions that favor a defendant, of course, do not raise any such constitutional objection.

The Supreme Court of Virginia has held that "our general rule is to give rebuttable presumptions permissive or burden-of-production-shifting effect only." *Wilson v. Commonwealth, 225 Va. 33, 41, 301 S.E.2d 1, 5 (1983)*; see also *Dobson v. Commonwealth, 260 Va. 71, 74–76, 531 S.E.2d 569, 571–73 (2000)*. In *Yap v. Commonwealth, 49 Va. App. 622, 633, 643 S.E.2d 523, 528 (2007)*, the Virginia Court of Appeals held that the rebuttable presumption in DUI cases is construed as a permissible inference. Therefore, the rebuttable presumption language previously appearing in the model instructions has been changed to a language of permissible inferences in Instruction Nos. 21.320, 21.350, 21.360, and 21.370.

Bifurcation. Bifurcated trials are permitted in all prosecutions involving traffic offenses. Va. Code Ann. § 46.2-943; *Farmer v. Commonwealth, 10 Va. App. 175, 179, 390 S.E.2d 775, 776 (1990), aff'd en banc, 12 Va. App. 337, 340, 404 S.E.2d 371, 372 (1991)*. Bifurcated trials are mandated in all felony and Class 1 misdemeanor trials. Va. Code Ann. § 19.2-295.1.



Instruction No. 21.100

Driving While Under the Influence of Alcohol and/or Drugs (Including "Per Se" Offenses)

The defendant is charged with the crime of driving while [having a blood alcohol concentration of 0.08 or more; having a concentration of 0.08 grams or more of alcohol per 210 liters of breath; under the influence of alcohol; under the influence of drugs; under the influence of a combination of alcohol and drugs; having a blood concentration of cocaine equal to or greater than 0.02 milligrams of cocaine per liter of blood; having a blood concentration of methamphetamine equal to or greater than 0.1 milligrams of methamphetamine per liter of blood; having a blood concentration of phencyclidine equal to or greater than 0.01 milligrams of phencyclidine per liter of blood; having a blood concentration of 3,4-methylenedioxymethamphetamine equal to or greater than 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant was** [driving; operating] **a motor vehicle; and**

(2) **That at the time** [he had a blood alcohol concentration of 0.08 or more; he had a concentration of 0.08 grams or more of alcohol per 210 liters of breath; he was under the influence of alcohol; he was under the influence of a narcotic drug or other self-administered intoxicant or drug, or a combination of such drugs to a degree which impaired his ability to drive or operate a motor vehicle safely; he was under the combined influence of alcohol and any drug or drugs to a degree which impaired his ability to drive or operate a motor vehicle safely; he had a blood concentration of cocaine equal to or greater than 0.02 milligrams of cocaine per liter of blood; he had a blood concentration of methamphetamine equal to or greater than 0.1 milligrams of methamphetamine per liter of blood; he had a blood concentration of phencyclidine equal to or greater than 0.01 milligrams of phencyclidine per liter of blood; he had a concentration of 3,4-methylenedioxymethamphetamine equal to or greater than 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P21.100

Driving While Under the Influence of Alcohol and/or Drugs (Including "Per Se" Offenses)

You have found the defendant guilty of the crime of driving while [having a blood alcohol concentration of 0.08 or more; having a concentration of 0.08 grams or more of alcohol per 210 liters of breath; under the influence of alcohol; under the influence of drugs; under the influence of a combination of alcohol and drugs; having a blood concentration of cocaine equal to or greater than 0.02 milligrams of cocaine per liter of blood; having a blood concentration of methamphetamine equal to or greater than 0.1 milligrams of methamphetamine per liter of blood; having a blood concentration of phencyclidine equal to or greater than 0.01 milligrams of phencyclidine per liter of blood; having a blood concentration of 3,4-methylenedioxymethamphetamine equal to or greater than 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A fine of a specific amount, but not less than $250 nor more than $2,500; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not less than $250 nor more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-266, 18.2-270 (punishment).

Case Authority:

Jackson v. Commonwealth, 274 Va. 630, 633–34, 652 S.E.2d 111, 112–13 (2007); *Williams v. Commonwealth, 265 Va. 268, 271-72, 576 S.E.2d 468, 470 (2003)*; *Reynolds v. City of Virginia Beach, 31 Va. App. 629, 631–23, 525 S.E.2d 65, 66 (2000)*; *Gray v. Commonwealth, 23 Va. App. 351, 477 S.E.2d 301 (1996)*; *Claxton v. City of Lynchburg, 15 Va. App. 152, 421 S.E.2d 891 (1992)*; *Potts v. Commonwealth, 12 Va. App. 1093, 1096, 408 S.E.2d 256, 257 (1991)*; *Wohlford v. Commonwealth, 3 Va. App. 467, 469–73, 351 S.E.2d 47, 48–50 (1986)*; *Beck v. Commonwealth, 216 Va. 1, 4–5, 216 S.E.2d 8, 9–10 (1975)*; *Nicolls v. Commonwealth, 212 Va. 257, 258, 184 S.E.2d 9, 10–11 (1971)*; *Mawyer v. Commonwealth, 203 Va. 898, 899–902, 128 S.E.2d 433, 434–36 (1962)*; *Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955)*.

Practice Commentary:

Elements of the Crime. The two basic elements required to be proved in a DUI prosecution, reflected in the language of the model instruction, are straightforward: "(1) that the defendant was operating or driving a motor vehicle, and (2) that he was under the influence of intoxicants at the time he was driving or operating it." *Nicolls, 212 Va. at 258, 184 S.E.2d at 10; Potts, 12 Va. App. at 1096, 408 S.E.2d at 257.* For definitions of the terms "under the influence" and "operating", see Instruction No. 21.200, Under the Influence—Definition and Instruction No. 21.250, Operating—Definition, respectively.

There is no *mens rea* requirement. In light of the legislature's omission of a *mens rea* requirement and the statute's underlying public safety concern, Virginia's appellate courts "have treated a defendant's intent to operate a vehicle as unnecessary to a determination of guilt for driving while under the influence pursuant to Code § 18.2-266." *Case v. Commonwealth, 63 Va. App. 14, 26, 753 S.E.2d 860, 866 (2014).*

For the purposes of Va. Code Ann. § 18.2-266 the term "motor vehicle" includes mopeds, while operated on public highways of this Commonwealth.

Whether the defendant was "under the influence" is not relevant to a "*per se*" charge under Va. Code Ann. § 18.2-266(i) or (v). *Taylor v. Commonwealth, 12 Va. App. 419, 423 n.1, 404 S.E.2d 78, 80 n.1 (1991).*

Reckless Driving Instruction in DUI Cases. In *Mawyer*, the sole question to be decided by the jury was whether the defendant was driving under the influence of intoxicants. *203 Va. at 902, 128 S.E.2d at 436.* Yet the defendant asked the trial court for an instruction that distinguished reckless driving from driving while under the influence of intoxicants, and admonished the jury that the defendant was only being tried for the latter charge. *Id. at 901–02, 128 S.E.2d at 436.* The court held that the trial court had properly refused such an instruction: "The first portion

was confusing and misleading in that it directed the attention of the jury to an offense with which the defendant was not charged. The remaining portion of the instruction was adequately covered in other instructions granted." *Id. at 902, 128 S.E.2d at 436.*

"Per se" Provision and Presumptions. Va. Code Ann. § 18.2-266(i) makes it unlawful for any person to drive "while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article." For a discussion of this *per se* provision, see *Davis v. Commonwealth, 8 Va. App. 291, 298, 381 S.E.2d 11, 15 (1989)* and *Taylor, 12 Va. App. at 423 n.1, 404 S.E.2d at 80 n.1*; see also Instruction No. 21.360, Alcohol Concentration—0.08 or More "Per Se" Offense. The rebuttable presumption language in Instruction No. 21.360 has been construed as a permissible inference as a result of *Yap v. Commonwealth, 49 Va. App. 622, 633, 643 S.E.2d 523, 528 (2007).*

Va. Code Ann. § 18.2-266(v) makes it unlawful for any person to drive "while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood." Although *Davis* and *Taylor* were decided prior to the enactment of Va. Code Ann. § 18.2-266 (v), the holdings in those cases that there is a presumption that the blood concentration of a substance at the time of the offense was the same as the concentration indicated by the results of a subsequent test may apply to a prosecution under § 18.2-266(v). See *Davis, 8 Va. App. at 300, 381 S.E.2d at 16*; *Taylor, 12 Va. App. at 421–23, 404 S.E.2d at 79–80.* Likewise, the holding in *Yap* that such a presumption should be construed only as a permissive inference may apply. See *Yap, 49 Va. App. at 633, 643 S.E.2d at 528.*

Punishment. Instruction No. P21.100 sets out the punishment for a first offense DUI where the defendant's blood alcohol content was less than 0.15 grams per 210 liters of breath. The law provides enhanced punishments for a first offense where, among other things, the defendant's blood alcohol concentration is at least 0.15 grams per 210 liters of breath, where the defendant is transporting a person 17 years of age or younger, and for second and third offense DUIs, for which this instruction must be modified. Conviction of a third offense is a Class 6 felony. Va. Code Ann. § 18.2-270. Where second or third offense DUI is alleged, the Commonwealth must plead and prove the prior conviction(s) and the guilt phase instruction must be modified to include that additional element. *Farmer v. Commonwealth, 10 Va. App. 175, 179–81, 390 S.E.2d 775, 776–78 (1990), aff'd en banc, 12 Va. App. 337, 404 S.E.2d 371 (1991).* Va. Code Ann. § 18.2-270 provides that any person convicted of a felony DUI offense (including DUI manslaughter and DUI maiming by motor vehicle or watercraft) is guilty of a Class 6 felony for any subsequent DUI conviction. The punishment includes a mandatory minimum term of imprisonment for one year and a mandatory minimum fine of $1000.

A conviction of drunk driving under local laws is a basis for enhanced punishment. *Auer v. Commonwealth, 46 Va. App. 637, 650–51, 621 S.E.2d 140, 146 (2005).*

Mandatory minimum punishments under Va. Code Ann. § 18.2-270 shall be cumulative, and mandatory minimum terms of confinement shall be served consecutively. Va. Code Ann. § 18.2-270(F). In no case may punishment exceed the Class 1 misdemeanor maximum term of confinement or fine for a first or second offense or that of a Class 6 felony for a third or subsequent offense. *Id.* The statute permits enhanced punishment for subsequent offenses even when the defendant was not convicted of his prior DUI at the time he committed the subsequent offense for which the enhanced punishment is to be applied. *Williams, 265 Va. at 271–72, 576 S.E.2d at 470.*

Where the defendant is arrested for a drug-related DUI offense, subsection (C) of Va. Code Ann. § 18.2-268.2 applies, not subsection (B), and the defendant does not have to be offered a breath test. *Patterson v. Commonwealth, 62 Va. App. 488, 495–98, 749 S.E.2d 538, 542–44 (2013).*

☞ ***PRACTICE POINTER:***

Where an accident resulting in death is caused by driving under the influence, the driver may be charged with involuntary manslaughter or aggravated involuntary manslaughter. See Va. Code Ann. § 18.2-36.1; see also Instruction Nos. 33.650, Involuntary Manslaughter, Motor Vehicle—Under the Influence, and 33.660, Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence.

☞ ***PRACTICE POINTER:***

Admissibility of the breath test certificate is governed by the provisions of Va. Code Ann. §§ 18.2-268.9 and 19.2-187.1. The Commonwealth is not required to prove that the breath test was conducted on equipment maintained by the Department of Forensic Science. *Fitzgerald v. Commonwealth, 61 Va. App. 279, 288, 734 S.E.2d 708, 712 (2012).* The defendant has the burden of showing noncompliance with procedural requirements. *Id. at 290–91, 734 S.E.2d at 713.*

☞ ***PRACTICE POINTER:***

Double jeopardy does not bar a conviction for vehicular aggravated manslaughter following a conviction for driving under the influence. *Davis v. Commonwealth, 57 Va. App. 446, 455–57, 703 S.E.2d 259, 263–64 (2011).*

☞ ***PRACTICE POINTER:***

The same set of facts may give rise to two separate proceedings, a criminal charge of DUI, and a civil proceeding for refusing to take a blood or breath test. *Cash v. Commonwealth, 251 Va. 46, 49, 466 S.E.2d 736, 738 (1996).* But a person cannot be convicted of both reckless driving under Va. Code Ann. § 46.2-852 and driving under the influence arising out of the same act or series of acts. See Va. Code Ann. § 19.2-294.1; *Harris v. City of Virginia Beach, 19 Va. App. 214, 216–17, 450 S.E.2d 401, 402 (1994); Padgett v. Commonwealth, 220 Va. 758, 759–61, 263 S.E.2d 388, 388–90 (1980).* But see *White v. Commonwealth, 26 Va. App. 410,*

412–15, 494 S.E.2d 896, 897–98 (1998) (holding that Va. Code Ann. § 19.2-294.1 does not bar conviction for both driving under the influence and speeding in excess of 20 mph over a speed limit of 40 mph).

☞ ***PRACTICE POINTER:***

The administrative suspension of a person's driving privilege under Va. Code Ann. § 46.2-391.2 is a civil, not criminal, sanction, and a subsequent prosecution for DUI based on the same facts does not constitute double jeopardy. *Depsky v. Commonwealth, 50 Va. App. 454, 466–67, 650 S.E.2d 867, 873–74 (2007); Ingram v. Commonwealth, 29 Va. App. 759, 764–65, 514 S.E.2d 792, 795 (1999); Tench v. Commonwealth, 21 Va. App. 200, 208, 462 S.E.2d 922, 925 (1995).*

☞ ***PRACTICE POINTER:***

Local statutes can prohibit driving under the influence on private property as well as highways. *Reynolds, 31 Va. App. at 631–32, 525 S.E.2d at 66.*

ALERTS:

• A certificate of blood alcohol analysis should not be admitted into evidence when the blood sample vial arrived at the testing laboratory with the box unsealed even when the vial itself remains sealed where the Commonwealth did not introduce the vial itself as evidence and presented no evidence concerning the labeling of the vial. *Williams v. Commonwealth, 10 Va. App. 636, 638–39, 394 S.E.2d 728, 729 (1990).*

• ***Unrepresented Defendants.*** If a defendant was unrepresented in a prior DUI proceeding resulting in a conviction and imposed jail time, the conviction cannot be used as a prior conviction, in either the guilt or sentencing phases of the trial, unless the entire jail sentence was suspended and the conviction resulted in no actual imprisonment. *Griswold, 252 Va. 113, 114–17, 472 S.E.2d 789, 789–91 (1996).* But see *Alabama v. Shelton, 535 U.S. 654 (2002)* (holding that a defendant has a constitutional right to counsel even where a sentence to imprisonment is suspended or probated). A prior uncounseled conviction may be used if the Commonwealth proves the defendant waived counsel. *Sargent v. Commonwealth, 5 Va. App. 143, 149, 360 S.E.2d 895, 898–99 (1987).*

• ***Final Judgment.*** Where no witnesses were sworn, or evidence taken, the general district court's dismissal of a second offense DUI charge, following the Commonwealth's refusal to present any evidence, did not constitute a final judgment on the merits. Consequently, the defendant's subsequent indictment and prosecution in the circuit court on the same charge were not barred by the doctrine of *res judicata. Neff v. Commonwealth, 39 Va. App. 13, 20, 569 S.E.2d 72, 76 (2002).* A circuit court violates double jeopardy if on a *de novo* appeal it amends a first offense DUI warrant to a second offense DUI when the district court previously convicted the defendant of the lesser included first offense on a charge of DUI second offense. *Turner v. Commonwealth, 49 Va. App. 381, 385–87, 641 S.E.2d 771, 773 (2007).*

• ***Drug Must Be Self-Administered.*** A person prosecuted for a violation of Va.

Code Ann. § 18.2-266(iii), which proscribes driving "under the influence of any narcotic, drug or other self-administered intoxicant or drug," may not be convicted unless the drug was "self-administered." *Jackson, 274 Va. at 633–34, 652 S.E.2d at 113* (reversing and dismissing a conviction for driving under the influence of drugs where the narcotic drug was administered by medical personnel, not the defendant). In *Lambert v. Commonwealth, 298 Va. 510, 840 S.E.2d 326 (2020)* the court affirmed a finding of self-administration because of the defendant's voluntary participation in a methadone program.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.110

Person Under Age 21 Operating Motor Vehicle After Illegally Consuming Alcohol

The defendant is charged with the crime of operating a motor vehicle after illegally consuming alcohol while under the age of twenty-one (21). The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was under the age of twenty-one (21) years; and

(2) That the defendant operated a motor vehicle; and

(3) That the operation was [after consuming alcohol in any amount; with a blood alcohol concentration of 0.02 or more by weight by volume, but less than 0.08 by weight by volume; with a blood alcohol concentration of 0.02 grams or more per 210 liters of breath, but less than 0.08 grams per 210 liters of breath]**; and**

(4) That the consumption was illegal.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, but you shall not fix his punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P21.110

Person Under Age 21 Operating Motor Vehicle After Illegally Consuming Alcohol

You have found the defendant guilty of the crime of operating a motor vehicle after illegally consuming alcohol while under the age of twenty-one (21).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A fine of a specific amount, but not less than $500 nor more than $2,500 or performance of not less than fifty (50) hours of community service; or,

(2) A fine of a specific amount, but not less than $500 nor more than $2,500 or performance of not less than fifty (50) hours of community service, and confinement in jail for a specific time, but not more than twelve (12) months.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-266.1, 19.2-295, 19.2-303.

CASE AUTHORITY:

Mejia v. Commonwealth, 23 Va. App. 173, 177–78, 474 S.E.2d 866, 868 (1996); Charles v. Commonwealth, 23 Va. App. 161, 163–65, 474 S.E.2d 860, 861–62 (1996).

PRACTICE COMMENTARY:

Permissive Inference and Prima Facie Case. Va. Code Ann. § 18.2-266.1 also provides that a blood alcohol concentration of 0.02 percent or more by weight by volume or 0.02 grams or more per 210 liters of breath but less than 0.08 percent by weight by volume or less than 0.08 grams per 210 liters of breath as indicated by a chemical test administered as provided in the statute shall be a violation of the section. This provision had been construed to create a rebuttable presumption that a defendant's blood alcohol concentration while driving was the same as indicated by the results of a subsequently administered test. *Charles, 23 Va. App. at 163–65, 474 S.E.2d at 861–62.* As a result of *Yap v. Commonwealth, 49 Va. App. 622, 643 S.E.2d 523 (2007)*, however, a "rebuttable presumption" should now be construed as a "permissible inference." A defendant may challenge the test results but evidence tending to prove that the defendant was not under the influence, such as adequate performance on field sobriety tests, is irrelevant and inadmissible. *Charles, 23 Va. App. at 165, 474 S.E.2d at 861.*

The same provision of the statute has also been construed to establish a *prima facie* case upon proof that the defendant was a person under the age of twenty-one (21) years who operated a motor vehicle while having the prescribed level of blood alcohol concentration. Upon proof of the *prima facie* case, the defendant has the burden of going forward with evidence raising a reasonable doubt as to the illegality of his alcohol consumption. *Mejia, 23 Va. App. at 177–78, 474 S.E.2d at 868.* But see *Yap, 49 Va. App. at 636, 643 S.E.2d at 530.*

Punishment. Violation of Va. Code Ann. § 18.2-266.1 is a Class 1 misdemeanor, but the statute mandates a mandatory minimum fine of $500 or performance of a mandatory minimum of 50 hours of community service and also provides that the operator's license of the defendant shall be forfeited for a period of one year. Based upon the statutory language of Va. Code Ann. § 18.2-266.1(B), Instruction No. P21.110 provides for imposition of a mandatory minimum fine of $500 or performance of a mandatory minimum of 50 hours of community service and for the imposition of a potential jail sentence. The instruction does not, however, provide for the mandatory license forfeiture, since the jury's ascertainment of punishment under the Virginia statutory sentencing provisions is limited to establishing the term of confinement in a state correctional facility or in jail and the amount of fine, if any, within the limits prescribed by law. Thereafter, the trial court may suspend some or all of the jury's recommended sentence, within any limits

prescribed by law, and may place the defendant on probation and order, among other things, community service. Va. Code Ann. §§ 19.2-295, 19.2-303; *Boyd v. Commonwealth, 28 Va. App. 537, 540–41, 507 S.E.2d 107, 109 (1998)*; *Virginia ex rel. Shifflett v. Cook, 333 F. Supp. 718, 721 (W.D. Va. 1971).*

As a consequence of the court and jury's delineated sentencing functions established by statute and by case authority, Instruction No. P21.110 sets forth the sole affirmative punishments a jury would be permitted to ascertain pursuant to the provisions of Va. Code Ann. § 18.2-266.1(B), consistent with the limits imposed by Va. Code Ann. § 19.2-295. The first alternative is comprised of the alternative components of a fine of at least the mandatory minimum amount of $500 or performance of a mandatory minimum of 50 hours of community service. The second alternative is comprised of dual components. They are the same fine or community service requirements as before, coupled with the imposition of a jail sentence of up to 12 months. The jury must choose either the first alternative or the dual component second alternative, since they are mutually exclusive based upon the mandatory aspect of the minimum fine or community service and the discretionary aspect of the jail sentence for a Class 1 misdemeanor.

In contrast to the approach taken with Instruction No. P6.350, Illegal Purchase of or Possession of Alcohol, the Committee has included the mandatory minimum community service alternative in Instruction No. P21.110 since the express statutory language of Va. Code Ann. § 18.2-266.1(B) makes the mandatory minimum community service provision a specific statutory variant of the mandatory minimum fine. Va. Code Ann. § 4.1-305(C), applicable to Instruction No. P6.350, expressly made community service a condition of probation, which is a sentencing power not given to juries under Virginia law. Va. Code Ann. §§ 19.2-295, 19.2-303; *Boyd, 28 Va. App. at 540–41, 507 S.E.2d at 109*; *Shifflett, 333 F. Supp. at 721.*

In addition to the foregoing, Va. Code Ann. § 18.2-266.1(B) expressly grants the court discretion to issue a restricted operator's license under certain terms and conditions.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.150

Maiming—Under the Influence

The defendant is charged with the crime of maiming of another as a result of driving while under the influence. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [driving; operating] **a motor vehicle; and**

(2) **That at the time** [he had a blood alcohol concentration of 0.08 or more; he had a concentration of 0.08 grams or more of alcohol per 210 liters of breath; he was under the influence of alcohol; he was under the influence of a narcotic drug or other self-administered intoxicant or drug, or a combination of such drugs to a degree which impaired his ability to drive or operate a motor vehicle safely; he was under the combined influence of alcohol and any drug or drugs to a degree which impaired his ability to drive or operate a motor vehicle safely; he had a blood concentration of cocaine equal to or greater than 0.02 milligrams of cocaine per liter of blood; he had a blood concentration of methamphetamine equal to or greater than 0.1 milligrams of methamphetamine per liter of blood; he had a blood concentration of phencyclidine equal to or greater than 0.01 milligrams of phencyclidine per liter of blood; he had a blood concentration of 3,4-methylenedioxymethamphetamine equal to or greater than 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood]; and

(3) **That as a result of driving under the influence the defendant unintentionally caused serious bodily injury to** (name of person); and

(4) **That the serious bodily injury resulted in permanent and significant physical impairment to (name of person); and**

(5) **That the defendant's conduct was so gross, wanton and culpable as to show a reckless disregard for human life.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of maiming of another as a result of driving while under the influence, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

reasonable doubt each of the following elements of that crime:

(1) That the defendant was [driving, operating] a motor vehicle; and

(2) That at the time [he] [she] had a blood alcohol concentration of 0.08 or more; [he] [she] had a concentration of 0.08 grams or more of alcohol per 210 liters of breath; [he] [she] was under the influence of alcohol; [he] [she] was under the influence of a narcotic drug or other self-administered intoxicant or drug, or a combination of such drugs to a degree which impaired [his] [her] ability to drive or operate a motor vehicle safely; [he] [she] was under the combined influence of alcohol and any drug or drugs to a degree which impaired [his] [her] ability to drive or operate a motor vehicle safely; [he] [she] had a blood concentration of cocaine equal to or greater than 0.02 milligrams of cocaine per liter of blood; [he] [she] had a blood concentration of methamphetamine equal to or greater than 0.1 milligrams of methamphetamine per liter of blood; [he] [she] had a blood concentration of phencyclidine equal to or greater than 0.01 milligrams of phencyclidine per liter of blood; [he] [she] had a blood concentration of 3,4-methylenedioxymethamphetamine equal to or greater than 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood; and

(3) That as a result of driving under the influence the defendant unintentionally caused serious bodily injury to (name of person); and

(4) That the serious bodily injury resulted in permanent and significant physical impairment to (name of person); and

(5) That the defendant [acted] [was in grave unsafe and injurious as to endanger a human life] [caused serious bodily injury to (name of person)].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of [either] a violation of [driving while under the influence] [operating] [as charged in the indictment] [as charged in count ____ of the indictment]. But if you do not find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant not guilty.

Instruction No. P21.150

Maiming—Under the Influence

You have found the defendant guilty of the crime of maiming of another as a result of driving while under the influence.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specified amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-51.4.

CASE AUTHORITY:

Rich v. Commonwealth, 292 Va. 791, 798–803, 793 S.E.2d 798, 802–05 (2016); Wright v. Commonwealth, 39 Va. App. 698, 703–05, 576 S.E.2d 242, 244–45 (2003).

PRACTICE COMMENTARY: Va. Code Ann. §§ 18.2-51.4(A) and 18.2-51.4(B) appear to establish distinct felony offenses with differing punishments. The instructions are drafted to cover all of the elements of § 18.2-51.4(B), a class 4 felony.

Va. Code Ann. §§ 18.2-51.4(A) creates a class 6 felony for the same offense conduct when element (4)—permanent and significant physical impairment—is not alleged. Instruction No. 21.150 may be modified to cover that offense by deleting the language in element (4) and by renumbering element (5) to (4). Instruction No. P21.150 will need to be revised to reflect the punishment for a class 6 felony in such cases.

For a discussion as to what constitutes "permanent and significant physical impairment," see *Martinez v. Commonwealth, 42 Va. App. 9, 23–25, 590 S.E.2d 57, 64 (2003)* and *Newton v. Commonwealth, 21 Va. App. 86, 89–91, 462 S.E.2d 117, 119 (1995).*

For a discussion of what constitutes driving in a manner so gross, wanton and culpable as to show a reckless disregard for human life, see *Wright, 39 Va. App. at 703–05, 576 S.E.2d at 244–45.*

The term "serious bodily injury" is defined in Instruction No. 21.210.

Intoxication from drugs constitutes "intoxication" for purposes of § 18.2-51.4. *Ratliff v. Commonwealth, 53 Va. App. 443, 445–50, 672 S.E.2d 913, 914–17 (2009).*

ALERTS:

• **Lesser Included Offense Instruction Not Included.** A lesser included offense instruction has not been offered in the absence of appellate guidance as to whether Va. Code Ann. § 18.2-51.4(A) is a lesser included offense of Va. Code Ann. § 18.2-51.4(B) or is a separate and distinct offense. Instruction No. 21.150 may be modified to include the option of a lesser included offense finding if deemed appropriate.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.200

Under Influence of Alcohol—Definition

A person is under the influence of alcohol if he has drunk enough alcoholic beverages to observably affect his manner, disposition, speech, muscular movement, general appearance or behavior.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 4.1-100, 18.2-268.10.

CASE AUTHORITY:

Wyatt v. Commonwealth, 47 Va. App. 411, 422 n.2, 624 S.E.2d 118, 123 n.2 (2006); Farren v. Commonwealth, 30 Va. App. 234, 240, 516 S.E.2d 253, 256–57 (1999); Clemmer v. Commonwealth, 208 Va. 661, 664–66, 159 S.E.2d 664, 666–67 (1968); Gardner v. Commonwealth, 195 Va. 945, 952–55, 81 S.E.2d 614, 618–20 (1954).

PRACTICE COMMENTARY: The instruction is based on the typical case where the defendant has been drinking, but with minor changes it can also be used where the defendant is charged with driving or operating a motor vehicle while under the influence of drugs. The language used is derived from the statutory definition of "intoxicated" found at Va. Code Ann. § 4.1-100.

"Intoxication" and "Under the influence" Defined. In *Gardner, 195 Va. at 952–53, 81 S.E.2d at 618*, the court held that it was error to instruct the jury that "under the influence" means "that a person has voluntarily taken such an amount of alcoholic beverage as to make him act differently from what he would have done if he had taken none." The court asserted that such an instruction was too broad, and would mislead the jury:

> The mere fact that a person reacts somewhat differently from what he would have done if he had consumed no intoxicant is not alone sufficient to prove that he was under the influence of intoxicating beverages. The phrase "under the influence of intoxicants" is composed of words of ordinary significance and their meaning is well known to the average juror, but in the absence of statute the phrase is not susceptible of a definite, accurate definition acceptable to all.

Id. at 953, 81 S.E.2d at 619.

Since the legislature promulgated a definition, however, the court said that it must apply to all cases in order to make the law uniform and consistent. *Id. at 954, 81 S.E.2d at 619.*

The use of the statutory definition of "intoxicated" to define the term "under the influence" was approved in *Clemmer, 208 Va. at 664–66, 159 S.E.2d at 666–67*, and reaffirmed in *Farren, 30 Va. App. at 240, 516 S.E.2d at 256–57*, and *Wyatt, 47 Va. App. at 422 n.2, 624 S.E.2d at 123 n.2.*

ALERTS:

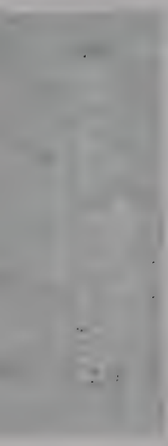
None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118



Instruction No. 21.210

Serious Bodily Injury—Definition

Serious bodily injury means bodily injury that involves substantial risk of death, extreme physical pain, obvious disfigurement that lasts for a long time, or loss or impairment of the function of a bodily member, organ or mental faculty that lasts for a long time.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-51.4(E).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The instruction is derived from Va. Code Ann. § 18.2-51.4(E) and defines the term "serious bodily injury" as used in element (3) of Instruction No. 21.150, Maiming—Under the Influence. This instruction should be given in conjunction with Instruction No. 21.150, Maiming—Under the Influence.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.250

Operating—Definition

Operating a motor vehicle means [driving the vehicle from one place to another; starting the engine; manipulating the electrical or mechanical equipment of the vehicle without actually putting the vehicle in motion; engaging the machinery of the vehicle which alone or in sequence will activate the motive power of the vehicle; sitting behind the steering wheel of a motor vehicle with the key inserted into the ignition switch of the vehicle].

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-266.

CASE AUTHORITY:

Sarafin v. Commonwealth, 288 Va. 320, 326–27, 764 S.E.2d 71, 74–75 (2014); *Enriquez v. Commonwealth, 283 Va. 511, 516–17, 722 S.E.2d 252, 255 (2012)*; *Nelson v. Commonwealth, 281 Va. 212, 218–219, 707 S.E.2d 815, 818 (2011)*; *Ngomondjami v. Commonwealth, 54 Va. App. 310, 316–18, 678 S.E.2d 281, 284–85 (2009)*; *Keesee v. Commonwealth, 32 Va. App. 263, 265–68, 527 S.E.2d 473, 474–76 (2000); Reynolds v. City of Virginia Beach, 31 Va. App. 629, 525 S.E.2d 65 (2000); Leake v. Commonwealth, 27 Va. App. 101, 105–09, 497 S.E.2d 522, 524–26 (1998); Propst v. Commonwealth, 24 Va. App. 791, 793–95, 485 S.E.2d 657, 658–59 (1997); Overbee v. Commonwealth, 227 Va. 238, 242–43, 315 S.E.2d 242, 244 (1984); Williams v. City of Petersburg, 216 Va. 297, 300–01, 217 S.E.2d 893, 896–97 (1975); Nicolls v. Commonwealth, 212 Va. 257, 258–59, 184 S.E.2d 9, 10–11 (1971).*

PRACTICE COMMENTARY:

"Drive or Operate" Requirement. Although the crime is colloquially referred to as drunk driving, Virginia's statute does not require the defendant to drive the car. Rather, it provides that the defendant must "drive or operate" the vehicle. Va. Code Ann. § 18.2-266. A number of decisions provide guidance concerning what kinds of actions constitute "operating" a motor vehicle.

The defendant in *Nicolls* was intoxicated when he was found slumped over in his car, his hands hanging down, with the motor running and in gear, the high beam lights turned on, and the heater in operation. A mechanic testified on the defendant's behalf, asserting that the transmission of the defendant's car was stopped because it was lacking fluid. The defendant argued that the evidence failed to prove that he was operating or driving a motor vehicle under the influence of intoxicants. The court disagreed, however, citing the definition of "operator" that is now found in Va. Code Ann. § 46.2-100: "every person who . . . drives or is in actual physical control of a motor vehicle." *212 Va. at 258–59, 184 S.E.2d at 10–11.*

In *Williams* the defendant, who had been drinking, was asleep in his car with the motor running. Two police officers succeeded in arousing the defendant, who made a motion to the gearshift before cutting the automobile off. Subsequently, the police had to force their way into the car when the defendant refused to come out. The court upheld the defendant's conviction for operating a motor vehicle while under the influence of intoxicants, stating:

> "Operating" not only includes the process of moving the vehicle from one place to another, but also includes starting the engine, or manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion. It means engaging the machinery of the vehicle which alone, or in sequence, will

activate the motive power of the vehicle.

216 Va. at 300, 217 S.E.2d at 896; see also *Nelson, 281 Va. at 218–19, 707 S.E.2d at 818* (holding that person asleep in vehicle with key in the accessory position and radio playing is operating a vehicle within the meaning of Va. Code Ann. § 18.2-266).

In *Sarafin*, the Supreme Court of Virginia held that the defendant was in actual physical control of his vehicle, and thus was operating the vehicle for purposes of Va. Code Ann. § 18.2-266, when he was seated behind the steering wheel, asleep, with the key in the ignition, parked in his private driveway. See *Sarafin, 288 Va. at 327, 764 S.E.2d at 75*.

"On a Highway" Requirement. *Sarafin* also holds that Va. Code Ann. § 18.2-266 does not contain an "on a highway" requirement for the operation of a motor vehicle, *id. at 328, 764 S.E.2d at 76*, and any reference to such a public highway requirement in *Enriquez, 283 Va. 511, 722 S.E.2d 252*, was "unbinding dicta." *Sarafin, 288 Va. at 330, 764 S.E.2d at 77*. With respect to mopeds, however, the Court in *Sarafin* recognized that Va. Code Ann. § 18.2-266 does contain an explicit "on a highway" requirement. *Id. at 327–28, 764 S.E.2d at 75*. If the defendant was operating a moped, Instruction No. 21.250 will need to be modified by adding the language "on a public roadway" to the applicable conduct of the defendant.

No Purposefulness Requirement. There is no requirement that a defendant act with any purpose in driving or operating a motor vehicle. *Ngomondjami, 54 Va. App. at 317–18, 678 S.E.2d at 285* (defendant found unconscious in driver seat with engine running).

ALERTS:

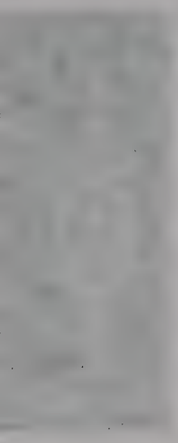
None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118



Instruction No. 21.300

Alcohol Concentration—0.05 or Less

You have received evidence of the amount of alcohol concentration of the defendant at the time that a chemical test was administered. If at that time the concentration was 0.05 or less, there is a rebuttable presumption that the defendant was not under the influence of alcohol at the time of the alleged offense. This presumption may be rebutted by other evidence.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-269(A)(1).

CASE AUTHORITY:

Lemond v. Commonwealth, 19 Va. App. 687, 692, 454 S.E.2d 31, 34 (1995); Taylor v. Commonwealth, 12 Va. App. 419, 421–23, 404 S.E.2d 78, 79–80 (1991); Davis v. Commonwealth, 8 Va. App. 291, 295–301, 381 S.E.2d 11, 13–17 (1989).

PRACTICE COMMENTARY: The language of the model instruction is adapted from the instruction examined in *Lemond*, which held that the instruction "was a correct statement of the law" in that it "correctly informed the jury that the test measures the BAC [blood alcohol concentration] at the time of the test, not at the time of driving" and it "covered the issues raised by the evidence" because, consistent with *Davis*, it informed the jury that "the blood alcohol measurement is an evidentiary fact which creates a rebuttable presumption that the measurement accurately reflects the blood alcohol concentration at the time of driving." *19 Va. App. at 692–93, 454 S.E.2d at 34–35*. It is erroneous to give an instruction that states the test measures the blood alcohol concentration at the time of operation. *Taylor, 12 Va. App. at 421–23, 404 S.E.2d at 79–80.*

PRACTICE POINTER:

Determining Alcohol Concentration. The alcohol concentration can be determined by a blood or a breath test. A blood test measures percent by weight by volume while a breath test measures grams per 210 liters of breath. Va. Code Ann. §§ 18.2-266, 18.2-268.2.

ALERTS:

• ***Rebuttable Presumption Retained.*** The decision in *Yap v. Commonwealth, 49 Va. App. 622, 633, 643 S.E.2d 523, 528 (2007)*, requires that the phrase "rebuttable presumption" be construed to mean "permissible inference" in cases where the blood alcohol concentration (BAC) level is 0.08 or more. *Yap*, however, does not require such a change when the rebuttable presumption is in favor of the defendant, such as in cases where the BAC level is 0.05 or less. Therefore, the use of the term "rebuttable presumption" is retained in this instruction.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.320

Alcohol Concentration—0.08 or More

You have received evidence of the amount of alcohol in the blood of the defendant at the time that a chemical test was administered. If at that time the amount was 0.08 or more, you are permitted, but not required, to infer that the defendant was under the influence of alcohol at the time of the alleged crime.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-269(A)(3).

CASE AUTHORITY:

Yap v. Commonwealth, 49 Va. App. 622, 633, 643 S.E.2d 523, 528 (2007); Lemond v. Commonwealth, 19 Va. App. 687, 692, 454 S.E.2d 31, 34 (1995); Taylor v. Commonwealth, 12 Va. App. 419, 421–23, 404 S.E.2d 78, 79–80 (1991).

PRACTICE COMMENTARY: The language used in the instruction is adapted from the instruction approved in *Lemond, 19 Va. App. at 692, 454 S.E.2d at 34*. The Court of Appeals further stated that the instruction correctly told the jury that the test measures the alcohol concentration at the time of the test even though there is a rebuttable presumption (now a permissible inference) that it reflects the blood alcohol concentration at the time of driving. *Id. at 692–93, 454 S.E.2d at 34–35*.

Time of measurement. An instruction stating that the test measures the blood alcohol concentration at time of operation is erroneous. *Taylor, 12 Va. App. at 421–23, 404 S.E.2d at 79–80*. But see *Wyatt v. Commonwealth, 47 Va. App. 411, 422 n.2, 624 S.E.2d 118, 123 n.2 (2006)* (citing *Basfield v. Commonwealth, 11 Va. App. 122, 125, 398 S.E.2d 80, 81–82 (1990)*, for presumption that blood alcohol concentration in the certificate is the same concentration that existed at the time of the offense).

Determining Alcohol Concentration. The alcohol concentration can be determined by a blood or a breath test: a blood test measures percent by weight by volume while a breath test measures grams per 210 liters of breath. Va. Code Ann. §§ 18.2-266, 18.2-268.2.

Per Se Violations Distinguished. This instruction is not applicable where the offense charged is the *per se* violation of Va. Code Ann. § 18.2-266(i). *Davis v. Commonwealth, 8 Va. App. 291, 298, 381 S.E.2d 11, 15 (1989)*; see also Instruction No. 21.360 (Alcohol Concentration—0.08 or More "Per Se" Offense).

PRACTICE POINTER:

While the accuracy of a specific test may be attacked by evidence, general evidence that blood or breath tests are subject to a margin of error is not sufficient to overcome the presumption (now a permissible inference) that the blood or breath test accurately reflects the blood alcohol concentration at the time of driving. *Nelson v. Commonwealth, 16 Va. App. 266, 269, 430 S.E.2d 553, 554–55 (1993).*

ALERTS:

• ***Rebuttable Presumption as Permissive Inference.*** As a result of the holding of the Court of Appeals in *Yap, 49 Va. App. 622, 643 S.E.2d 523*, this instruction has been revised to substitute "permitted to infer" for "rebuttable presumption."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.340

Alcohol Concentration—More Than 0.05 But Less Than 0.08

You have received evidence of the amount of alcohol in the blood of the defendant at the time that a chemical test was administered. If at that time the amount of alcohol in the blood of the defendant was more than 0.05 but less than 0.08, there is no presumption that the defendant was or was not under the influence of alcohol at the time of the alleged crime, but the evidence of the amount of alcohol in the blood of the defendant at the time that a chemical test was administered may be considered by you with other evidence in determining the guilt or innocence of the defendant.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-269(A)(2).

CASE AUTHORITY:

Taylor v. Commonwealth, 12 Va. App. 419, 421–23, 404 S.E.2d 78, 79–80 (1991); Davis v. Commonwealth, 8 Va. App. 291, 295–301, 381 S.E.2d 11, 13–17 (1989).

PRACTICE COMMENTARY:

None.

ALERTS:

• The alcohol concentration can be determined by a blood or a breath test: a blood test measures percent by weight by volume while a breath test measures grams per 210 liters of breath. Va. Code Ann. §§ 18.2-266, 18.2-268.2, 18.2-269.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.350

Drug Concentration—Not "Per Se" Offense

You have received evidence of the amount of [cocaine; methamphetamine; phencyclidine; 3,4-methylenedioxymethamphetamine] **in the blood of the defendant at the time that a chemical test was administered. If at that time the amount was equal to or greater than** [0.02 milligrams of cocaine per liter of blood; 0.1 milligrams of methamphetamine per liter of blood; 0.01 milligrams of phencyclidine per liter of blood; 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood] **you are permitted, but not required, to infer that the defendant was under the influence of drugs at the time of the alleged crime to a degree which impaired his ability to drive or operate any motor vehicle safely.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-269(A)(4).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This instruction is not applicable where the offense charged is the *per se* violation of Va. Code Ann. § 18.2-266(v). *Davis v. Commonwealth, 8 Va. App. 291, 300, 381 S.E.2d 11, 16 (1989).*

ALERTS:

• ***Rebuttable Presumption as Permissive Inference.*** As a result of the decision of the Court of Appeals in *Yap v. Commonwealth, 49 Va. App. 622, 643 S.E.2d 523 (2007)*, this instruction has been revised to substitute "permitted to infer" for "rebuttable presumption."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.360

Alcohol Concentration—0.08 or More "Per Se" Offense

You have received evidence of the amount of blood alcohol concentration of the defendant at the time that a chemical test was administered. If at that time the concentration was 0.08 or more in the defendant's blood, you are permitted, but not required, to infer that the defendant had a blood alcohol concentration of 0.08 or more at the time of the alleged crime.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-266(i).

CASE AUTHORITY:

Yap v. Commonwealth, 49 Va. App. 622, 633–34, 643 S.E.2d 523, 528 (2007); Taylor v. Commonwealth, 12 Va. App. 419, 421–23, 404 S.E.2d 78, 79–80 (1991); Davis v. Commonwealth, 8 Va. App. 291, 295–301, 381 S.E.2d 11, 13–17 (1989).

PRACTICE COMMENTARY: This instruction applies only where the offense charged is a violation of Va. Code Ann. § 18.2-266(i), *i.e.*, driving while having a blood alcohol concentration of 0.08 or more or a breath concentration of 0.08 grams or more per 210 liters of breath. Whether the defendant was "under the influence" is not relevant to a charge under Va. Code Ann. § 18.2-266(i). *Taylor, 12 Va. App. at 423 n.1, 404 S.E.2d at 80 n.1.*

Because the chemical test measures the blood alcohol concentration at the time when the test is administered, the Court in *Taylor* held that it is erroneous to give an instruction stating that the chemical test measures the blood alcohol concentration at the time of operation. *Id. at 421–23, 404 S.E.2d at 79–80.* But see *Wyatt v. Commonwealth, 47 Va. App. 411, 422 n.2, 624 S.E.2d 118, 123 n.2 (2006)* (citing *Basfield v. Commonwealth, 11 Va. App. 122, 125, 398 S.E.2d 80, 81–82 (1990)*, for presumption that blood alcohol concentration in the certificate is the same concentration that existed at the time of the offense).

ALERTS:

• ***Rebuttable Presumption as Permissive Inference.*** As a result of the holding in *Yap, 49 Va. App. at 633–34, 643 S.E.2d at 528*, this instruction has been revised to substitute "permitted to infer" for "rebuttable presumption."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.370

Drug Concentration—"Per Se" Offense

You have received evidence of the concentration of [cocaine; methamphetamine; phencyclidine; 3,4-methylenedioxymethamphetamine] **in the blood of the defendant at the time that a chemical test was administered. If at that time the concentration was equal to or greater than** [0.02 milligrams of cocaine per liter of blood; 0.1 milligrams of methamphetamine per liter of blood; 0.01 milligrams of phencyclidine per liter of blood; 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood] **you are permitted, but not required, to infer that the defendant had a** [cocaine; methamphetamine; phencyclidine; 3,4-methylenedioxymethamphetamine] **concentration equal to or greater than** [0.02 milligrams of cocaine per liter of blood; 0.1 milligrams of methamphetamine per liter of blood; 0.01 milligrams of phencyclidine per liter of blood; 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood] **at the time of the alleged crime.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-266(v).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This instruction applies only where the offense charged is the *per se* violation of Va. Code Ann. § 18.2-266(v). Although *Davis v. Commonwealth, 8 Va. App. 291, 300, 381 S.E.2d 11, 16 (1989)*, was decided prior to the enactment of Va. Code Ann. § 18.2-266(v), the holding in *Davis* may support the giving of this instruction in a prosecution under Va. Code Ann. § 18.2-266(v).

ALERTS:

• ***Rebuttable Presumption as Permissive Inference.*** As a result of the decision in *Yap v. Commonwealth, 49 Va. App. 622, 643 S.E.2d 523 (2007)*, this instruction has been revised to substitute "permitted to infer" for "rebuttable presumption."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.400

Refusal to Submit to Blood or Breath Test

The defendant is charged with the crime of unreasonably refusing to submit to a [blood; breath; blood and breath] **test. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant was operating his motor vehicle on a highway; and**

(2) **That the defendant refused to submit to a** [blood; breath] **test to determine the** [alcohol; drug; alcohol and drug] **content of his blood; and**

(3) **That the defendant was arrested for a violation of** [Virginia Code § 18.2-266; 18.2-266.1; or subsection B of § 18.2-272 or of a similar ordinance]**; and**

(4) **That the refusal was unreasonable.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-268.2, 18.2-268.3, 18.2-268.4.

Case Authority:

Shin v. Commonwealth, 294 Va. 517, 522–30, 808 S.E.2d 401, 403–06 (2017); Sarafin v. Commonwealth, 288 Va. 320, 328, 764 S.E.2d 71, 76 (2014); D'Amico v. Commonwealth, 287 Va. 284, 290, 754 S.E.2d 291, 294 (2014); Brothers v. Commonwealth, 50 Va. App. 468, 476, 650 S.E.2d 874, 878 (2007); Sawyer v. Commonwealth, 43 Va. App. 42, 53–55, 596 S.E.2d 81, 86–87 (2004); Lamay v. Commonwealth, 29 Va. App. 461, 470–76, 513 S.E.2d 411, 415–18 (1999); Deaner v. Commonwealth, 210 Va. 285, 293, 170 S.E.2d 199, 204 (1969).

Practice Commentary:

Foundation for Implied Consent. The implied consent to take a test of the alcohol content of a driver's blood is based on the policy that operating a motor vehicle is a conditional privilege. *Deaner, 210 Va. at 289, 170 S.E.2d at 202.*

In *Birchfield v. North Dakota, 136 S. Ct. 2160, 2176–78 (2016)*, the United States Supreme Court held that the Fourth Amendment imposes no bar to implied consent statutes that require a motorist to submit to warrantless breath tests. However, the Fourth Amendment requires a search warrant for more invasive blood tests, and a motorist may not be criminally punished for refusing to submit to a warrantless blood test. *Id. at 2178–2184.*

Nevertheless, the defendant is excused from the implied consent doctrine if his refusal is reasonable under the circumstances: "[T]here must be some reasonable factual basis for the refusal, for example, endangerment of the health of the accused by the withdrawal of blood." *Bailey v. Commonwealth, 215 Va. 130, 131, 207 S.E.2d 828, 829 (1974).*

"Public Highway" Requirement. In *Sarafin*, the Court recognized that the General Assembly had included a requirement that the operation of the motor vehicle occur on a "highway" in Va. Code Ann. § 18.2-268.2 (implied consent), but had omitted such a requirement, except as to mopeds, in Va. Code Ann. § 18.2-266 (driving while under the influence). *288 Va. at 328, 764 S.E.2d at 76.*

The implied consent statute (Va. Code Ann. § 18.2-268.2) uses the definition of highway contained in Va. Code Ann. § 46.2-100. For a discussion of the meaning of "highway," see *Kim v. Commonwealth, 293 Va. 304, 319-20, 797 S.E.2d 766, 774 (2017)* ("no trespassing" signs posted at the entrance of a housing complex meant that the private road was not a public highway and, therefore, the defendant was not required to submit to a breath test); *Mason v. Commonwealth, 64 Va. App. 292, 304–05, 767 S.E.2d 726, 732–33 (2015)* and *Seaborn v. Commonwealth, 54 Va. App. 408, 412–13, 679 S.E.2d 565, 567 (2009).*

"Reasonable Refusal" Defense. Generally, a driver is required to submit to a blood or breath test under the implied consent statute when he is arrested for

violation of Va. Code Ann. § 18.2-266, § 18.2-266.1, or subsection (B) of § 18.2-272 or similar ordinance. Va. Code Ann. § 18.2-268.2(A) and (B). However, a driver is excused from taking a blood or breath test under the implied consent doctrine if his refusal is reasonable under the circumstances. *Bailey, 215 Va. at 131, 207 S.E.2d at 829.* To be excused under this exception, "there must be some reasonable factual basis for the refusal, for example, endangerment of the health of the accused by the withdrawal of blood." *Id.*

A driver's subjective belief that he was not under the influence while he was operating a vehicle, or the fact that he could and did operate his vehicle in a proficient manner despite having consumed alcohol beforehand, is not a reasonable basis for refusing a breath or blood test, and evidence of his state of sobriety or proficiency in operating the vehicle is not admissible. *Shin, 294 Va. at 527, 808 S.E.2d at 406; Cash v. Commonwealth, 251 Va. 46, 50, 466 S.E.2d 736, 738 (1996); Quinn v. Commonwealth, 9 Va. App. 321, 322-25, 388 S.E.2d 268, 269-71 (1990).*

A person's unwillingness to take a breath or blood test without counsel present, or without prior consultation with counsel, does not constitute a reasonable basis for refusal. *D'Amico, 287 Va. at 290, 754 S.E.2d at 294; Deaner, 210 Va. at 293, 170 S.E.2d at 204.*

Constitutionality; Fifth Amendment. The requirement that a driver submit to a blood or breath test does not violate the *Fifth Amendment* privilege against self-incrimination because it is not testimonial in nature. *Shin*, 294 Va.at 529–30, 808 S.E.2d at 407; *Rowley v. Commonwealth, 48 Va. App. 181, 185–86, 629 S.E.2d 188, 190 (2006).*

In *Shin*, the Supreme Court of Virginia held that the unconstitutional conditions doctrine does not apply to the portion of the implied consent law that addresses breath samples, but did not reach the question whether the doctrine applies to the portion of the implied consent law that addresses blood samples. 294 Va. at 525, 808 S.E.2d at 405.

Where a defendant "fail[s] to offer an objectively reasonable basis for refusing to provide a breath sample, he . . . necessarily fail[s] to establish that Code § 18.2-268.3 [i]s unconstitutional as applied to him. Accordingly, such a defendant "lacks standing to challenge the constitutionality of the statute." *Shin*, 294 Va. at 527, 808 S.E.2d at 406.

Va. Code Ann. § 18.2-268.3 is not unconstitutionally vague, because it employs an objective standard for determining when a refusal is reasonable, and it has been held that this objective standard would be satisfied where a person refuses on the ground that his health would be endangered by the test. Accordingly, "because there is at least one constitutional application" of Va. Code Ann. § 18.2-268.3, "[a] facial constitutional challenge [to the statute] fails." *Shin*, 294 Va. at 527, 808 S.E.2d at 406.

Virginia's implied consent law "does not implicate the protections encompassed

by Article I, § 8 of the Constitution of Virginia," because that provision only prevents a person from being compelled to give self-incriminating evidence; it does not protect an individual from having to give incriminatory evidence. "The distinction is subtle, but important[:] Self-incriminating evidence is testimonial or communicative of the individual's thoughts, whereas incriminatory evidence is not," and "[a] breath test, like a blood test, is not testimonial; it does not communicate anything related to an individual's thoughts or motivations." *Shin, 294 Va. at 529–30, 808 S.E.2d at 407.*

Breath Test—Physical Inability. If the accused driver contends that he was physically unable to take a breath test and that the Commonwealth was required to offer a blood test, "the burden rests upon the accused driver to produce evidence that he was physically unable to take the test. Once the accused driver places that evidence before the trial court, the Commonwealth may present evidence in rebuttal. A trial court's determination that the accused driver has carried his burden of proof as to physical inability is a condition precedent to any finding that the Commonwealth was required to offer a blood test." *Hudson v. Commonwealth, 266 Va. 371, 381–82, 585 S.E.2d 583, 589 (2003).*

First and Subsequent Violations. A first violation of unreasonably refusing to submit to a breath or blood test is a civil offense, administrative in nature, for which the only sanction is a one-year suspension of the defendant's privilege to drive. Va. Code Ann. § 18.2-268.3(A) and (B); *City of Virginia Beach v. Siebert, 253 Va. 250, 252, 483 S.E.2d 214, 215 (1997); Cash, 251 Va. at 49, 466 S.E.2d at 738;* The defendant may petition the trial judge to grant a restricted driving permit after 30 days for the balance of the one year suspension. Va. Code Ann. § 18.2-268.3(E). The statute also provides for criminal penalties for refusal to take a blood or breath test within 10 years of a prior driving under the influence related offense or failure to take blood or breath test offense. Where conviction of such prior offense is alleged, the Commonwealth must plead and prove the prior conviction, and the guilt phase instruction must be modified to include the additional element and the applicable Class 1 misdemeanor penalty provisions, in which case this instruction must be bifurcated into guilt and punishment phases. Va. Code Ann. § 18.2-268.4 provides for trial by jury if requested by either party.

Criminal and Civil Matters Arising from Same Facts. The same set of facts may give rise to two separate proceedings, a criminal charge of DUI, and a civil proceeding for refusing to take a blood or breath test. *Cash , 251 Va. at 49, 466 S.E.2d at 738.*

☞ ***PRACTICE POINTER:***

Procedural Safeguards. Although the requirements in subsections (B) and (C) of Virginia Code Ann. § 18.2-268.3 provide significant procedural safeguards to the accused, they are not elements of the refusal offense. *D'Amico, 287 Va. at 289, 754 S.E.2d at 294.*

ALERTS:

- The suspension of driving privileges imposed by Va. Code Ann. § 18.2-

268.3(A) and (B) is in addition to the suspension period provided under Va. Code Ann. § 46.2-391.2.

• A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. § 18.2-266(i) and (ii) or both, Va. Code § 18.2-266.1, or Va. Code Ann. § 18.2-272(B) or of a similar ordinance is required to submit to a breath test. Va. Code Ann. § 18.2-268.2(B); *Sarafin, 288 Va. at 328, 764 S.E.2d at 76*. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. Va. Code Ann. § 18.2-268.2. But this does not require an arresting officer to compel a defendant to submit to chemical testing as a prerequisite to prosecution, *Oliver, 40 Va. App. 20, 22–24, 577 S.E.2d 514 515–16 (2003)*, and the language of the statute mandating that the defendant submit to a breath test does not impose upon the arresting officer any obligation to offer one. *Brown-Fitzgerald, 51 Va. App. at 236–37, 656 S.E.2d at 424*.

• A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. § 18.2-266(iii), (iv), or (v), Va. Code Ann. § 18.2-266.1, or Va. Code Ann. § 18.2-272(B) or of a similar ordinance may be required to submit to a blood test. Va. Code Ann. § 18.2-268.2(C). A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. § 18.2-266(i) or (ii) or both, who submits to a breath test pursuant to Va. Code Ann. § 18.2-268.2(B), or refuses to take or is incapable of taking such a breath test, may be required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law enforcement officer has reasonable cause to believe the person was driving under the influence of any drug or combination of drugs, or the combination of alcohol and drugs. Va. Code Ann. § 18.2-268.2(C); *Sarafin, 288 Va. at 328, 764 S.E.2d at 76*.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.425

Evidence of Refusal to Submit to Blood or Breath Test

Evidence that the defendant unreasonably refused to submit to a blood or breath test to determine the [alcohol; drug] **content of his blood is offered solely to explain the absence of a chemical test and shall not be considered by you as evidence of the defendant's guilt in this case.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-268.10(C).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This instruction should be used only where evidence has been admitted that the defendant was found to have unreasonably refused to submit to a blood or breath test to determine the alcohol or drug content of his blood under Va. Code Ann. § 18.2-268.3.

☞ ***PRACTICE POINTER:***

Evidence of a finding of unreasonable refusal by a defendant is admissible upon motion by the Commonwealth or the defendant. Va. Code Ann. § 18.2-268.10(C).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

Instruction No. 21.450

Consent to Blood or Breath Test

Any person who is arrested for driving under the influence on a highway is required to consent to take a test to determine the alcohol content of his blood. One is excused from taking the test if his refusal is reasonable under the circumstances. There must be some reasonable factual basis for the refusal.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-268.2, 18.2-268.3.

CASE AUTHORITY:

Sarafin v. Commonwealth, 288 Va. 320, 328, 764 S.E.2d 71, 76 (2014); D'Amico v. Commonwealth, 287 Va. 284, 290, 754 S.E.2d 291, 294 (2014); Brown-Fitzgerald v. Commonwealth, 51 Va. App. 232, 236–37, 656 S.E.2d 422, 424 (2008); Brothers v. Commonwealth, 50 Va. App. 468, 476, 650 S.E.2d 874, 878 (2007); Oliver v. Commonwealth, 40 Va. App. 20, 22–24, 577 S.E.2d 514, 515–16 (2003); Lamay v. Commonwealth, 29 Va. App. 461, 470–76, 513 S.E.2d 411, 415–18 (1999); Quinn v. Commonwealth, 9 Va. App. 321, 324, 388 S.E.2d 268, 270 (1990); Driver v. Commonwealth, 6 Va. App. 583, 585, 371 S.E.2d 27, 28 (1988); Bailey v. Commonwealth, 215 Va. 130, 131, 207 S.E.2d 828, 828–29 (1974); Deaner v. Commonwealth, 210 Va. 285, 293, 170 S.E.2d 199, 204 (1969).

PRACTICE COMMENTARY:

Valid and Timely Arrest Requirements. The admissibility of the test results hinges on a valid arrest of the defendant. The test results may not be admitted into evidence under the implied consent law if the arrest of the defendant was not valid. See *Roseborough v. Commonwealth, 281 Va. 233, 239, 704 S.E.2d 414, 417 (2011).*

The arrest must also be timely. *Sprouse v. Commonwealth, 53 Va. App. 488, 492–494, 673 S.E.2d 481, 482–483 (2009).* In *Bristol*, the Court held that "a driver must be arrested within three hours of an offense before that driver may be required to submit to a breath or blood test." *Bristol v. Commonwealth, 272 Va. 568, 574-75, 636 S.E.2d 460, 464 (2006).*

A summons to appear on a DUI charge is considered a "post-arrest" document. In *Sprouse*, the certificate of analysis was ruled inadmissible where the defendant submitted to the blood test before the officer placed the defendant under arrest and then issued the summons to appear on the charge. *53 Va. App. at 492–94, 673 S.E.2d at 482–83.* However, in *Young v. Commonwealth, 57 Va. App. 731, 739–41, 706 S.E.2d 53, 57–58 (2011)*, the court allowed the certificate of analysis where the officer told the defendant that he was under arrest, advised him of his *Miranda* rights and the implied consent law, stayed with him while his blood was drawn and then issued a summons to appear on the DUI charge.

PRACTICE POINTER:

For a discussion of various aspects of Virginia's implied consent law, see Practice Commentary to Instruction 21.400, Refusal to Submit to Blood or Breath Test.

ALERTS:

• A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. §§ 18.2-266(i) or (ii) or both, or Va. Code Ann. § 18.2-272(B), or of Va. Code Ann. § 18.2-266.1 or of a similar ordinance is required to submit to a

breath test. Va. Code Ann. § 18.2-268.2(B); *Sarafin, 288 Va. at 328, 764 S.E.2d at 76*. If the breath test is unavailable or the person is physically unable to submit to the breath test, a blood test shall be given. Va. Code Ann. § 18.2-268.2. But this does not require an arresting officer to compel a defendant to submit to chemical testing as a prerequisite to prosecution, *Oliver, 40 Va. App. at 22–24, 577 S.E.2d at 515–16*, and the language of the statute mandating that the defendant submit to a breath test does not impose upon the arresting officer any obligation to offer one. *Brown-Fitzgerald, 51 Va. App. at 236–37, 656 S.E.2d at 424*.

• A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. § 18.2-266(iii), (iv), or (v), Va. Code Ann. § 18.2-266.1, or Va. Code Ann. § 18.2-272(B) or of a similar ordinance may be required to submit to a blood test. Va. Code Ann. § 18.2-268.2(C). A person arrested for operating a motor vehicle on a highway in violation of Va. Code Ann. § 18.2-266(i) or (ii) or both, who submits to a breath test pursuant to Va. Code Ann. § 18.2-268.2(B), or refuses to take or is incapable of taking such a breath test, may be required to submit to tests to determine the drug or both drug and alcohol content of his blood if the law enforcement officer has reasonable cause to believe the person was driving under the influence of any drug or combination of drugs, or the combination of alcohol and drugs. Va. Code Ann. § 18.2-268.2(C); *Sarafin, 288 Va. at 328, 764 S.E.2d at 76*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118

CHAPTER 22

DRUGS

Scope Note

Instruction No. 22.100 Schedule I or II Controlled Substance—Manufacturing

Instruction No. P22.100(a) Schedule I or II Controlled Substance—Manufacturing

Instruction No. P22.100(b) Schedule I or II Controlled Substance—Possession Only

Instruction No. 22.120 Marijuana—Manufacturing—Not for Own Use

Instruction No. P22.120 Marijuana—Manufacturing—Not for Own Use

Instruction No. 22.140 Manufacturing Marijuana—Definition

Instruction No. 22.200 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation

Instruction No. P22.200 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation

Instruction No. 22.220 Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation

Instruction No. P22.220 Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation

Instruction No. 22.240 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation

Instruction No. P22.240 Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation

Instruction No. 22.260 Marijuana—Selling, Giving, or Distributing: Evidence of Accommodation

Instruction No. P22.260 Marijuana—Selling, Giving, or Distributing: Evidence of Accommodation

Instruction No. 22.270 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—28 Grams or More—§ 18.2-248.03(A)

Instruction No. P22.270 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—28 Grams or More—§ 18.2-248.03(A)

Instruction No. 22.275 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—227 Grams or More—§ 18.2-248.03(B)

Instruction No. P22.275 Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—227 Grams or More—§ 18.2-248.03(B)

Instruction No. 22.277 Manufacturing Methamphetamine While a Minor or Incapacitated Person is Present

Instruction No. P22.277 Manufacturing Methamphetamine While a Minor or Incapacitated

Person is Present

Instruction No. 22.280 Profit—Definition

Instruction No. 22.300 Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation

Instruction No. P22.300 Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation

Instruction No. 22.310 Marijuana—Possession With Intent to Manufacture—Not for Own Use

Instruction No. P22.310 Marijuana—Possession With Intent to Manufacture—Not for Own Use

Instruction No. 22.320 Marijuana—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation

Instruction No. P22.320 Marijuana—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation

Instruction No. 22.330 Knowing and Intentional Possession—Definition

Instruction No. 22.340 Controlled Substance—Knowledge of Character

Instruction No. 22.350 Intent to Distribute—Factors to Be Considered in Determining

Instruction No. 22.360 Schedule I or II Controlled Substance—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

Instruction No. P22.360 Schedule I or II Controlled Substance—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

Instruction No. 22.370 Marijuana—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

Instruction No. P22.370 Marijuana—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

Instruction No. 22.400 Schedule III, IV or V Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute: No Evidence of Accommodation

Instruction No. P22.400 Schedule V Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute

Instruction No. 22.410 Schedule III or IV Controlled Substance—Selling, Giving, Distributing or Possessing With the Intent to Distribute: Evidence of Accommodation

Instruction No. P22.420 Schedule III Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute: No Evidence of Accommodation

Instruction No. P22.430 Schedule III Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: Evidence of Accommodation

Instruction No. P22.440 Schedule IV Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: No Evidence of Accommodation

Instruction No. P22.450 Schedule IV Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: Evidence of Accommodation

Instruction No. 22.500(a) Schedule I, II, or III Controlled Substance—Possession

Instruction No. 22.500(b) Possession of a Schedule IV Controlled Substance

Instruction No. 22.500(c) Possession of a Schedule V Controlled Substance

Instruction No. 22.500(d) Possession of a Schedule VI Controlled Substance

Instruction No. P22.500(a) Schedule I or II Controlled Substance—Possession

Instruction No. P22.500(b) Schedule I Controlled Substance—Cannabimimetic Agents—Possession

Instruction No. P22.500(c) Schedule III Controlled Substance—Possession

Instruction No. 22.520 Marijuana—Possession

Instruction No. P22.520 Possession of Marijuana—Second or Subsequent Offense

Instruction No. 22.520(a) Marijuana—Possession; Presumption of Personal Use

Instruction No. 22.521 Marijuana or Marijuana Products—Possession

Instruction No. P22.521 Marijuana or Marijuana Products—Possession

Instruction No. 22.522(a) Marijuana Plants for Personal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants

Instruction No. P22.522(a) Marijuana Plants for Personal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants

Instruction No. 22.522(b) Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants

Instruction No. P22.522(b) Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants

Instruction No. 22.522(c) Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants

Instruction No. P22.522(c) Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants

Instruction No. 22.523 Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations

Instruction No. P22.523(a) Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations

Instruction No. P22.523(b) Marijuana Plants for Personal Use—Home Cultivation—Second Offense

Instruction No. 22.524 Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities

Instruction No. P22.524 Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities

Instruction No. 22.525 Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities

Instruction No. P22.525 Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities

Instruction No. 22.526 Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway

Instruction No. P22.526 Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway

Instruction No. 22.527 Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus

Instruction No. P22.527 Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus

Instruction No. 22.528 Carrying Marijuana or Marijuana Products in Motor Vehicle Used or

Licensed to Transport Passengers for Hire

Instruction No. P22.528 Carrying Marijuana or Marijuana Products in Motor Vehicle Used or Licensed to Transport Passengers for Hire

Instruction No. 22.600 Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to Persons Under 18

Instruction No. P22.600 Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to Persons Under 18

Instruction No. 22.610 Methamphetamine Precursor Chemicals—Possession with Intent to Manufacture Methamphetamine, Methcathinone or Amphetamine

Instruction No. P22.610 Methamphetamine Precursor Chemicals—Possession with Intent to Manufacture Methamphetamine, Methcathinone or Amphetamine

Instruction No. 22.650 Controlled Substance, Imitation Controlled Substance, Marijuana—Manufacture, Distribution, or Possession With Intent to Distribute on or Near Educational, Child Day Center or Recreational Property

Instruction No. P22.650 Controlled Substance, Imitation Controlled Substance, Marijuana—Manufacture, Distribution, or Possession With Intent to Distribute on or Near Educational, Child Day Center or Recreational Property

Instruction No. 22.700 Drug Paraphernalia—Sale or Possession With Intent to Sell

Instruction No. P22.700 Drug Paraphernalia—Sale or Possession With Intent to Sell

Instruction No. 22.701 Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant

Instruction No. P22.701 Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant

Instruction No. 22.702 Drug Paraphernalia—Definition

Instruction No. 22.720 Drug Paraphernalia—Possession

Instruction No. P22.720 Drug Paraphernalia—Possession

Instruction No. 22.740 Drug Paraphernalia—Sale to Minor of Printed Matter Advertising Instruments for Administering Marijuana or Controlled Substances

Instruction No. P22.740 Drug Paraphernalia—Sale to Minor of Printed Matter Advertising Instruments for Administering Marijuana or Controlled Substances

Instruction No. 22.800 Imitation Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

Instruction No. P22.800 Imitation Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

Instruction No. 22.805 Imitation Controlled Substance—Definition

Instruction No. 22.900 Anabolic Steroid—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

Instruction No. P22.900 Anabolic Steroid—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

Instruction No. 22.910 Transporting Controlled Substances Into The Commonwealth

Instruction No. P22.910 Transporting Controlled Substances Into The Commonwealth

SCOPE NOTE

The following instructions cover the principal crimes in Title 18.2 relating to drugs and marijuana prior to July 1, 2021, and certain offenses involving marijuana occurring on or after July 1, 2021, under the criminal provisions of the Cannabis Control Act, Va. Code Ann. § 4.1-1100, *et seq.* Wherever the terms "controlled substances," "marijuana," and "Schedules I, II, III, IV, V, and VI" are used in Title 18.2, they refer to those terms as used or defined in the Drug Control Act. Va. Code Ann. § 18.2-247(A). The Drug Control Act is Chapter 34 of Title 54.1. Whenever the terms "marijuana" or "marijuana products" are used in relation to offenses occurring on or after July 1, 2021, under the Cannabis Control Act, the terms are defined in Va. Code Ann. § 4.1-600.

Schedule I or II Drugs

Subsections (A) and (C) of Va. Code Ann. § 18.2-248 make three types of action unlawful with respect to Schedule I and II drugs: (1) manufacture, (2) distribution, which includes sale and gift, and (3) possession with intent to manufacture or distribute. In addition, with regard to distribution and possession with intent to distribute, Va. Code Ann. § 18.2-248(D) establishes a lesser penalty if done as an accommodation. See Va. Code Ann. § 54.1-3456 dealing with designer drugs that emulate or simulate the effects of Schedule I or Schedule II controlled substances.

Va. Code Ann. § 18.2-248(J) makes the possession of methamphetamine precursor chemicals unlawful.

Va. Code Ann. § 18.2-248.02 makes the manufacture of methamphetamine in the presence of a child unlawful. See Instruction No. 22.277.

Instruction No. 22.100 is limited to manufacturing a Schedule I or II controlled substance. Instruction Nos. 22.200 and 22.240 concern distribution of a Schedule I or II controlled substance: No. 22.200 is applicable where there is no evidence of accommodation and No. 22.240 is applicable where there is such evidence. See also Instruction No. 22.600 in connection with distribution of a controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving controlled substances on or near the educational, recreational, or state hospital property specified in Va. Code Ann. § 18.2-255.2.

Instruction Nos. 22.300 and 22.360 cover cases of possession with intent to manufacture or distribute a Schedule I or II controlled substance. Instruction No. 22.300 applies where there is no evidence of accommodation. Instruction No. 22.360 should be used where there is such evidence. See also Instruction No. 22.650 in connection with possession with intent to distribute controlled substances on or near the educational, recreational, or state hospital property specified in Va. Code Ann. § 18.2-255.2.

Instruction Nos. 22.270 and 22.275 cover the two methamphetamine offenses defined in Va. Code Ann. § 18.2-248.03.

Possession of Schedule I or II drugs is covered by Instruction No. 22.500, based on Va. Code Ann. § 18.2-250.

Schedule III, IV or V Drugs

Code § 18.2-248(E)(3) establishes a lesser penalty for Schedule III and IV drugs if done as an accommodation. Instruction Nos. 22.400, 22.420, and 22.440 are applicable if there is no evidence of accommodation. Instruction Nos. 22.410, 22.430, and 22.450 are applicable where

there is such evidence. Instruction No. 22.400 also covers the manufacture, distribution, and possession with intent to manufacture or distribute Schedule V drugs.

Possession of Schedule I, II, III, IV, V, or VI drugs is covered by Instruction No. 22.500, based on Va. Code Ann. § 18.2-250. See also Instruction No. 22.600 in connection with distribution of a Schedule I, II, III, or IV controlled substance or marijuana to a minor and Instruction No. 22.650 in connection with possession with intent to distribute controlled substances or marijuana on or near the educational, recreational, clearly marked licensed child day center or state facility specified in Va. Code Ann. § 18.2-255.2.

ALERT: Effective July 1, 2021, pursuant to Va. Code Ann. § 4.1-1109, a person (i) possessing or consuming marijuana or marijuana products in or upon the grounds of a public elementary or secondary school during school hours or school or student activities, or (ii) consuming marijuana or marijuana products in or upon the grounds of a public elementary or secondary school after school hours or school or student activities, is guilty of a Class 2 misdemeanor.

Imitation Controlled Substances

Va. Code Ann. § 18.2-247(B) defines "imitation controlled substance." Subsection (A) of Va. Code Ann. § 18.2-248 prohibits manufacturing, distributing or possessing with intent to distribute an imitation controlled substance, subsection (B) of Va. Code Ann. § 18.2-248 lists factors a court may consider in determining intent in regard to imitation controlled substances offenses, and subsection (G) of Va. Code Ann. § 18.2-248 establishes as a Class 6 felony a violation of Va. Code Ann. § 18.2-248(A) in regard to imitation controlled substances. Instruction No. 22.800 is on manufacturing, distributing or possessing with intent to distribute imitation controlled substances. See also Instruction No. 22.600 in connection with distribution of an imitation controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving imitation controlled substances on or near the educational, recreational, child day center or state facility specified in Va. Code Ann. § 18.2-255.2.

Va. Code Ann. § 18.2-248.4 provides that it shall be a Class 1 misdemeanor knowingly to sell or display for sale, or to distribute, any book, pamphlet or other printed matter which he knows is intended to promote the distribution of an imitation controlled substance. No instruction has been provided for this statute, but Instruction No. 22.740 could be used as a model for drafting such an instruction.

Marijuana

Va. Code Ann. § 18.2-248.1 establishes the penalties for manufacturing marijuana, possession with intent to manufacture marijuana, distribution (including sale and gift) of marijuana, and possession with intent to distribute marijuana. The following instructions cover this statute: Instruction No. 22.120 (manufacturing); Instruction No. 22.220 (distribution, no evidence of accommodation); Instruction No. 22.260 (distribution, evidence of accommodation); Instruction No. 22.310 (possession with intent to manufacture); Instruction No. 22.320 (possession with intent to distribute, no evidence of accommodation); and Instruction No. 22.370 (possession with intent to distribute, evidence of accommodation). See also Instruction No. 22.140, which defines manufacturing marijuana, Instruction No. 22.600 concerning distribution of marijuana to persons under 18, and Instruction No. 22.650 in connection with offenses involving marijuana on or near the educational, recreational, child day center or state facility specified in Va. Code Ann. § 18.2-255.2.

Instruction No. 22.520, based on Va. Code Ann. § 18.2-250.1, addresses possession of

marijuana.

ALERT: Effective July 1, 2020, simple marijuana possession under Va. Code Ann. § 18.2-250.1 is no longer a state crime. On and after that date, and until July 1, 2021, any person who violates Va. Code Ann. § 18.2-250.1 is subject to a civil penalty of no more than $25.00. The General Assembly repealed Va. Code Ann. § 18.2-250.1, effective July 1, 2021, and has adopted Va. Code Ann. § 4.1-1100 relating to simple possession of marijuana. Instruction No. 22.520 addresses marijuana possession offenses prior to July 1, 2020.

Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

ALERT: The General Assembly has repealed Va. Code Ann. § 18.2-250.1 as of July 1, 2021. Effective on that date and thereafter, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both, and is addressed by Instruction No. 22.521.

ALERT: Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Va. Code Ann. § 4.1-1101(D). Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

ALERT: Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

As a result, the substance of any related jury instruction(s) may be dependent on the date of the alleged offense.

Transporting five or more pounds of marijuana into the Commonwealth with intent to sell or distribute is a separate offense under Va. Code Ann. § 18.2-248.01. It is covered by Instruction No. 22.910.

Cannabimimetic Agents (formerly Synthetic Cannabinoids)

Former Va. Code Ann. § 18.2-248.1:1 defined "synthetic cannabinoids" and established penalties for their possession, distribution, possession with intent to distribute, and manufacture. That statute was repealed effective July 1, 2014. For offenses occurring on and after that date, the term "cannabimimetic agents" was substituted for the term "synthetic cannabinoids," and "cannabimimetic agents" are now placed on the list of controlled substances in Schedule I, Va. Code Ann. § 54.1-3446(6), where they are subject to the same penalties as those for other Schedule I controlled substances with the exception of simple possession, which is penalized as a Class 1 misdemeanor instead of a Class 5 felony. Va. Code Ann. § 18.2-250. Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

Definitions

Instruction No. 22.280 defines profit as used in connection with drug transfers; it should be considered in determining whether a distribution was for profit or accommodation.

Instruction No. 22.330 provides a definition of knowing and intentional possession of controlled substances. Instruction No. 22.340 concerns the defendant's knowledge of the character of the controlled substance that he allegedly possessed, distributed, or manufactured. Instruction No. 22.350, listing factors to be considered in determining the existence of intent to manufacture or distribute, should also be considered in cases of possession with intent to manufacture or distribute.

Steroids

Va. Code Ann. § 18.2-248.5 deals with anabolic steroids. Instruction No. 22.900 incorporates the statutory crime and punishment for manufacturing, distributing or possessing with intent to distribute an anabolic steroid.

Distribution to Minors

See Instruction No. 22.600 covering distribution of marijuana, and Schedule I, II, III or IV controlled substances by persons 18 years of age or older, to persons under 18 years of age who are at least 3 years younger than the defendant, or to cause any person under age 18 to assist in such distribution. Va. Code Ann. § 18.2-255.

Offenses on/near Educational or Recreational Property

Va. Code Ann. § 18.2-255.2 makes it unlawful to manufacture, distribute, or possess with intent to distribute a controlled substance, an imitation controlled substance, or marijuana on or near specified educational, recreational, child day center, or state facility. The statute sets out the penalty but also contains an accommodation provision that reduces the offense to a Class 1 misdemeanor. See Instruction No. 22.650.

Effective July 1, 2021, pursuant to Va. Code Ann. § 4.1-1108, the consumption of marijuana or a marijuana product or offering of marijuana or a marijuana product to another, whether accepted or not, in a public place is not a crime, but rather subject to a civil penalty of $25.00 for a first offense, and subject to a civil penalty of $25.00 and referral to a substance abuse or treatment program for a second offense. A person convicted of this offense for a third or subsequent time is guilty of a Class 4 misdemeanor.

Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration.

It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

Drug Paraphernalia

Instruction Nos. 22.700 and 22.720 deal with drug paraphernalia. Instruction No. 22.740 is on sale to minors of printed matter advertising drug paraphernalia.

Miscellaneous Offenses

Delivery of drugs to prisoners is prohibited by Va. Code Ann. § 18.2-474.1. Possession of drugs by prisoners in a correctional facility is prohibited by Va. Code Ann. § 53.1-203. See generally *Herron v. Commonwealth, 55 Va. App. 691, 688 S.E.2d 901 (2010)*. Chapter 42, Prisoner Related Crimes, contains instructions related to prisoners and drugs.

Other drug crimes for which no instructions are provided include knowingly distributing without prescription illegal stimulants to minors (Va. Code Ann. § 18.2-248.5), conspiracy (Va. Code Ann. § 18.2-256), attempts (Va. Code Ann. § 18.2-257), maintaining a common nuisance (Va. Code Ann. § 18.2-258), obtaining drugs or procuring the admission of drugs by fraud, deceit or forgery (Va. Code Ann. § 18.2-258.1), prescribing drugs except as authorized (Va. Code Ann. § 18.2-260), inhaling drugs (Va. Code Ann. § 18.2-264), and continuing criminal enterprise (Va. Code Ann. § 18.2-248). Instructions based on the appropriate statutory language can easily be drafted.

While instructions in the Conspiracy and Attempts chapters may be used to draft instructions for conspiracies or attempts to commit drug offenses, the penalty provisions for such instructions should conform to Va. Code Ann. § 18.2-256 or Va. Code Ann. § 18.2-257, respectively. For a discussion of how to determine when a drug sale shows a drug conspiracy, see *Richard v. Commonwealth, 72 Va. App. 598, 851 S.E.2d 68 (2020)*; *Edwards v. Commonwealth, 18 Va. App. 45, 441 S.E.2d 351 (1994)*. *Wilkins v. Commonwealth, 18 Va. App. 293, 443 S.E.2d 440 (1994)* (*en banc*). See also the Comment to Instruction No. 14.100.

Violation of any provision of Va. Code Ann. § 18.2-258.1 constitutes a Class 6 felony, and statutory language as well as the instructions found in the Forgery and Fraud chapters may be used to prepare an instruction. (For an instruction on obtaining or attempting to obtain a drug while using a false name, see Instruction No. 27.200.)

No instructions have been provided for the "drug kingpin" statute (Va. Code Ann. § 18.2-248(H)).

Transporting specified large quantities into Virginia for distribution or sale (Va. Code Ann. § 18.2-248.01) is covered by Instruction No. 22.910.

Evidentiary Matters

By amendment effective July 1, 2020, Va. Code Ann. § 18.2-248.1 provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use, a presumption which will have no application for marijuana possession offenses occurring on or after July 1, 2021. Effective July 1, 2021, Va. Code Ann. § 4.1-1100 legalizes a person's possession on his person or in a public place of no more than one ounce of marijuana or marijuana product, and establishes a civil penalty for the possession of no more than one pound of marijuana or marijuana product.

Effective March 1, 2021, the Virginia General Assembly enacted numerous statutory amendments related to motor vehicles and associated equipment and moving violations. The amendments forbid law enforcement officers from stopping the motor vehicles for minor violations, and provide that no evidence discovered or obtained as the result of such a stop, including evidence discovered or obtained with the operator's consent, will be admissible in any trial, hearing, or other proceeding. See, e.g., Va. Code Ann. § 15.2-919 (stopping motorcycles, mopeds, scooters, etc., for violation of noise ordinance); Va. Code Ann. § 18.2-250.1 (stopping searching, or seizing any person, place, or thing solely on the basis of the odor of marijuana); Va. Code Ann. § 46.2-646 (expired vehicle registration); Va. Code Ann. § 46.2-810.1 (smoking in a vehicle with a minor present); Va. Code Ann. § 46.2-1003 (defective and unsafe motor vehicle equipment); Va. Code Ann. § 46.2-1013 (rear tail and license plate lights); Va. Code Ann. § 46.2-1014 (brake lights); Va. Code Ann. § 46.2-1030 (headlights); Va. Code Ann. § 46.2-1049 (exhaust system); Va. Code Ann. § 46.2-1052 (tinting films, decals, and other windshield obstructions); Va. Code Ann. § 46.2-1054 (suspension of objects from rear view mirror, sun visor, etc.); Va. Code Ann. § 46.2-1094 (seat belt violation); and Va. Code Ann. § 46.2-1057 (state inspection sticker).

Va. Code Ann. § 18.2-262 provides that no person shall be excused from testifying or producing records in cases involving drug charges on grounds of self-incrimination although testimony given and records produced by such persons on behalf of the Commonwealth or produced when called for by the trial judge shall not be used against him, nor shall he be prosecuted for the offense as to which he testifies. Refusal to testify or to produce records is a Class 2 misdemeanor.

Va. Code Ann. § 18.2-263 provides that in any action under this chapter or under the Drug Control Act, the Commonwealth is not required to negate any exception, excuse, proviso or exemption. A defendant, charged with the unlawful sale of drugs, who defends on the ground that he distributed the drugs for accommodation only, is not required to establish such accommodation beyond a reasonable doubt, but only by a preponderance of the evidence. He is required to produce some evidence which satisfies the trier of the facts that his distribution was for accommodation. The presumption created by the statute retains its effect until opposing evidence (whether from the Commonwealth of the defendant) is sufficient to make a case for the jury. See *Stillwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978)*; *Porter v. Commonwealth, 66 Va. App. 302, 785 S.E.2d 224 (2016)*; *Hodge v. Commonwealth*, 217 Va. 338, 228 S.E.2d 692 (1976); *Warlitner v. Commonwealth, 217 Va. 348, 228 S.E.2d 698 (1976)*; see also *Patterson v. New York, 432 U.S. 197 (1977)*. The *Stillwell* and *Porter* cases more directly relate to the burden/presumption in drug accommodation cases. The *Hodge* and *Warlitner* cases pertain more to the issue of burden shifting and presumptions and are actually not in the context of drug accommodation cases. The *Patterson* case also is not in the context of drug accommodation cases and deals more with burden shifting and with the issue of the burden placed on a defendant to prove an affirmative defense.

If the exception is raised by evidence, then the instruction defining the crime should include, as an element of the crime, appropriate language requiring the jury to find that the defendant does not come within the exception.

An accommodation instruction is properly given, not in the merits phase, but in the penalty phase. Evidence as to accommodation may be offered in the penalty phase. *Porter v. Commonwealth, 66 Va. App. 302, 308–09, 785 S.E.2d 224, 227–28 (2016)*.

Recidivist Statutes and "Substantially Similar" Convictions

Va. Code Ann. §§ 18.2-248 and 18.2-248.1 call for heightened penalties if the defendant "has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction" or "two or more such offenses or of substantially similar offenses in any other jurisdiction." Convictions of offenses in other jurisdictions are not "substantially similar 'if a person may be convicted of an offense under another jurisdiction's statute for conduct which might not result in a conviction under the code section at issue.' " *Mason v. Commonwealth, 64 Va. App. 599, 609, 770 S.E.2d 224, 229 (2015).* However, "the prior conviction is admissible if it is substantially similar to *any* prohibited act set out in Code § 18.2-248(A), i.e. to manufacture, sell, distribute or possess with intent to distribute." *Id. at 616, 770 S.E.2d at 232.*

Instructions in Other Chapters

Under Va. Code Ann. § 18.2-460(C), it is a Class 5 felony "[i]f any person by threats of bodily harm or force knowingly attempts . . . to obstruct or impede the administration of justice in any court relating to a violation of or conspiracy to violate Va. Code Ann. § 18.2-248 or subdivision (a)(3), (b) or (c) of § 18.2-248.1." See Instruction No. 35.300.

Section 18.2-308.4 defines and punishes the crime of possessing a firearm while possessing certain controlled substances. See Instruction No. 18.610.

Using a false name to obtain or attempt to obtain a drug is prohibited by Va. Code Ann. § 18.2-258.1. See Instruction No. 27.200.

Delivering, attempting to deliver and conspiracy to deliver drugs or marijuana to a prisoner is prohibited by Va. Code Ann. § 18.2-474.1. See Instruction No. 42.300.

Lesser-Included Offenses

Austin v. Commonwealth, 33 Va. App. 124, 531 S.E.2d 637 (2000) holds that possession of controlled substance is a lesser-included offense of distribution of that substance.

Patterson v. Commonwealth, 19 Va. App. 698, 454 S.E.2d 367 (1995) holds that possession of marijuana is a lesser-included offense of manufacture of marijuana. *Austin* and *Patterson* together strongly imply that possession is a lesser-included offense of manufacture. However, effective July 1, 2020, simple marijuana possession under Va. Code Ann. § 18.2-250.1 was no longer a state crime. On and after that date, and until July 1, 2021, any person who violates Va. Code Ann. § 18.2-250.1 is subject to a civil penalty of no more than $25.00.

The General Assembly has repealed Va. Code Ann. § 18.2-250.1, effective July 1, 2021. Effective July 1, 2021, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both, and is addressed by Instruction No. 22.521.

Logan v. Commonwealth, 43 Va. App. 504, 600 S.E.2d 133 (2004) holds that possession of marijuana is not a lesser-included offense of Va. Code Ann. § 18.2-474.1 (delivering marijuana to a prisoner).

Instruction No. 22.100

Schedule I or II Controlled Substance—Manufacturing

The defendant is charged with the crime of manufacturing (name of drug) **which is a Schedule** [I; II] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant manufactured** (name of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty of the crime of manufacturing (name of drug).

[If you find that the Commonwealth has failed to prove that the defendant manufactured (name of drug) but that the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly and intentionally possessed (name of drug), then you shall find the defendant guilty of the crime of possession of (name of drug).]

[You shall not fix the defendant's punishment until your verdict has been returned and further evidence has been heard by you.]

[If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above crimes, then you shall find the defendant not guilty.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant manufactured (name of drug), **then you shall find the defendant not guilty of manufacturing** (name of drug).

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-248(A), 54.1-3446, 54.1-3448.

Case Authority:

Austin v. Commonwealth, 33 Va. App. 124, 531 S.E. 637 (2000); *Patterson v. Commonwealth, 19 Va. App. 698, 454 S.E. 2d 367 (1995).*

Note:

When the jury may find from the evidence that the defendant possessed the controlled substance but did not manufacture it, the bracketed paragraphs should be included in the instruction and the last paragraph should be deleted.

Instruction No. P22.100(a)

Schedule I or II Controlled Substance—Manufacturing

You have found the defendant guilty of the crime of manufacturing (name of drug) **which is a Schedule** [I; II] **controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248(C).

ALERTS:

• The punishments (including confinement, fines and restitution) for a first, second, third or subsequent conviction for the manufacture of methamphetamine or a substance containing a detectable amount of methamphetamine are found in Va. Code Ann. § 18.2-248(C).

Instruction No. P22.100(b)

Schedule I or II Controlled Substance—Possession Only

You have found the defendant guilty of the crime of possession of (name of drug) **which is a Schedule** [I; II] **controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year and no more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-250, 54.1-3446, 54.1-3448.

CASE AUTHORITY:

Austin v. Commonwealth, 33 Va. App. 124 (2000); Rhodes v. Commonwealth, 223 Va. 743, 748, 292 S.E.2d 373, 376 (1982); Spear v. Commonwealth, 221 Va. 450, 454–58, 270 S.E.2d 737, 740–42 (1980). See also Instruction No. 22.330 for cases on possession.

PRACTICE COMMENTARY: Va. Code Ann. § 54.1-3401 defines "manufacture" and an instruction in the language of that section would be appropriate in a manufacturing case.

The accommodation provision in Va. Code Ann. § 18.2-248(D) refers only to instances where the defendant "gave, distributed or possessed with intent to give," making no reference to manufacturing or to possession with intent to manufacture.

While intentional possession is a lesser-included offense of manufacturing, possession with intent to manufacture is not. Va. Code Ann. § 18.2-248 creates two separate offenses: manufacturing; and possession with intent to manufacture. *Spear, 221 Va. at 455–56, 270 S.E.2d at 741.* As the Supreme Court explained in *Rhodes*, "[p]ossession and manufacturing are two separate and distinct offenses, each of which requires proof of a fact which the other does not." *223 Va. at 748, 292 S.E.2d at 376.*

Evidence other than chemical tests can be sufficient to prove that a substance is a controlled substance. *Anderson v. Commonwealth, 215 Va. 21, 25–26, 205 S.E.2d 393, 395–96 (1974).*

ALERTS:

• If any question of fact exists concerning the nature of the drug or a question of fact concerning whether a particular drug is included in a particular schedule, an appropriate instruction should be drafted. Usually, no issue will arise as to whether the drug is a controlled substance or the schedule in which it is included.

• A defendant may receive an enhanced punishment for manufacturing a Schedule I or II controlled substance upon a second or subsequent conviction of such a violation. Va. Code Ann. § 18.2-248(C). The penalty for a second conviction is not less than 5 years (3 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence) nor more than life and a fine of not more than $500,000. In such event, the instruction should contain an additional element requiring the Commonwealth to prove that the offense is a second offense and the enhanced punishment provision should be substituted for the first offense punishment provision.

• A person convicted of a third or subsequent offense is subject to a sentence of 10 years to life imprisonment and a fine of up to $ 500,000, with 10 years of the sentence being a mandatory minimum term.

• In *Jones v. Commonwealth, 69 Va. App. 582, 589, 822 S.E.2d 19, 22 (2018)*, the Court of Appeals held that any prior conviction of an offense under Va. Code Ann. § 18.2-248, including a conviction as an accommodation under Va. Code Ann. § 18.2-248(D), triggers the enhanced-punishment provisions of Va. Code Ann. § 18.2-248(C).

• When the possession instruction is used, and a definition of possession is appropriate, a statement defining possession, such as that suggested in Instruction No. 22.330, should be given in a separate instruction. Possession is a Class 5 felony, except that any person other than an inmate of a penal institution as defined in Va. Code Ann. § 53.1-1 or in the custody of an employee thereof who violates this section with respect to a cannabimimetic agent is guilty of a Class 1 misdemeanor. Va. Code Ann. § 18.2-250(A)(a). The term "cannabimimetic agent" is defined in Va. Code Ann. § 54.1-3446(6). Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

• The civil penalty for simple possession of marijuana, effective July 1, 2020, and marijuana offenses in general through that date are covered by Va. Code Ann. §§ 18.2-248.1 and 18.2-250.1. See Instruction No. 22.520.

• Effective July 1, 2021, Va. Code Ann. § 18.2-250.1 is repealed. On that date and thereafter, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both, and is addressed by Instruction No. 22.521.

• Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Va. Code Ann. § 4.1-1101(D). Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The

term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.120

Marijuana—Manufacturing—Not for Own Use

The defendant is charged with the crime of manufacturing marijuana not for defendant's own use. The Commonwealth must prove beyond a reasonable doubt that the defendant manufactured marijuana not for his own use.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty of manufacturing marijuana [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant manufactured marijuana not for his own use, then you shall find the defendant not guilty of manufacturing.

***ALERT*:**

For alleged offenses occurring before July 1, 2020: Under circumstances where the jury may find from the evidence that the defendant possessed marijuana although he did not manufacture it or did not manufacture it other than for his own use, the last paragraph should be deleted and the following bracketed language should be included in the instruction:

[If you find that the Commonwealth has failed to prove that the defendant manufactured marijuana not for his own use but that the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly and intentionally possessed marijuana, then you shall find the defendant guilty of possession of marijuana and fix his punishment at:

(1) Confinement in jail for a specific time, but not more than thirty (30) days; or

(2) A fine of a specific amount, but not more than $500; or

(3) Confinement in jail for a specific time, but not more than thirty (30) days, and a fine of a specific amount, but not more than $500.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above crimes, then you shall find this defendant not guilty.]

For alleged offenses occurring on or after July 1, 2020 until July 1, 2021: Based on the 2020 amendments to Va. Code Ann. § 18.2-250.1, effective July 1, 2020, simple possession of marijuana is a civil offense, a violation of which is subject to a penalty of no more than $25.00.

Under circumstances where the jury may find from the evidence that the defendant possessed marijuana although he did not manufacture it or did not manufacture it other than for his own use, the last paragraph should be deleted and the following bracketed language should be included in the instruction:

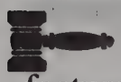
[If you find that the Commonwealth has failed to prove that the defendant manufactured marijuana not for his own use but that the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly and intentionally

possessed marijuana, then you shall find the defendant liable for violating the offense of possession of marijuana and impose a civil penalty of no more than twenty-five dollars ($25.00).

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above offenses, then you shall find the defendant not guilty.]

For alleged offenses occurring on or after July 1, 2021: Effective July 1, 2021, Va. Code Ann. § 18.2-250.1 is repealed. Effective on that date and thereafter, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine.

Under circumstances where the jury may find from the evidence that the defendant possessed marijuana although he did not manufacture it or did not manufacture it other than for his own use, the last paragraph should be deleted, and the language of Instruction No. 22.521 incorporated in this instruction.



PRACTICE COMMENTARY: Va. Code Ann. § 54.1-3401 defines "manufacture," and an instruction incorporating the language of that definition would be appropriate in a manufacturing case.

Instruction No. P22.120

Marijuana—Manufacturing—Not for Own Use

You have found the defendant guilty of the crime of manufacturing marijuana not for defendant's own use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specified term of imprisonment, but not less than five (5) years, nor more than thirty (30) years and a fine of a specific amount, but not more than $10,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.1.

CASE AUTHORITY:

Cooper v. Commonwealth, 54 Va. App. 558, 573–74, 680 S.E.2d 361, 369 (2009); *King v. Commonwealth, 2 Va. App. 708, 709–711, 347 S.E.2d 530, 530–31 (1986).*

PRACTICE COMMENTARY: Drug paraphernalia and narcotics scattered throughout the house, disparate drugs, stolen firearms, packaging of drugs, and expert testimony were sufficient circumstances to find that the defendant manufactured marijuana not for his own use. *Cooper, 54 Va. App. at 574, 680 S.E.2d at 369.*

In *King, 2 Va. App. at 709–711, 347 S.E.2d at 530–31*, a case of first impression, the Court held appropriate an instruction incorporating the definition of manufacture contained in the Drug Control Act [now Va. Code Ann. § 54.1-3401] in a prosecution for feloniously manufacturing marijuana. See Instruction No. 22.140 for a definition of manufacturing marijuana.

The accommodation provision in Va. Code Ann. § 18.2-248.1 refers only to instances where the defendant "gave, distributed or possessed with intent to give or distribute," making no reference to manufacturing or to possession with intent to manufacture. Va. Code Ann. § 18.2-248.1 also prohibits possession of marijuana with the intent to manufacture such substance not for his own use. This offense is covered in Instruction No. 22.310.

ALERTS:

• A person convicted of a third or subsequent felony offense under Va. Code Ann. § 18.2-248.1 is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum term.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.140

Manufacturing Marijuana—Definition

To manufacture marijuana means [to grow; to produce; to prepare; to propagate; to convert; to process; to plant; to cultivate; to harvest] **marijuana.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 54.1-3401.

CASE AUTHORITY:

Cooper v. Commonwealth, 54 Va. App. 558, 573–74, 680 S.E.2d 361, 369 (2009); *King v. Commonwealth, 2 Va. App. 708, 709–711, 347 S.E.2d 530, 530–31 (1986).*

PRACTICE COMMENTARY: In *King, 2 Va. App. at 709–711, 347 S.E.2d at 530–31*, the Court held that the definition of manufacture contained in the Drug Control Act [now Va. Code Ann. § 54.1-3401] was appropriate in a prosecution for feloniously manufacturing marijuana in violation of Va. Code Ann. § 18.2-248.1(c). See also *Cooper, 54 Va. App. at 573–74, 680 S.E.2d at 369.*

ALERTS:

The Cannabis Control Act, Va. Code Ann. § 4.1-600, *et seq.*, effective July 1, 2021, provides the following definition for "manufacturing" or "manufacture" of marijuana or marijuana products:

> 'Manufacturing' or 'manufacture' means the production of marijuana products or the blending, infusing, compounding, or other preparation of marijuana and marijuana products, including marijuana extraction or preparation by means of chemical synthesis. 'Manufacturing' or 'manufacture' does not include cultivation or testing.

Va. Code Ann. § 4.1-600. Additionally, effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.200

Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation

The defendant is charged with the crime of distributing (name of drug), **which is a Schedule** [I; II] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant distributed** (name of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant distributed (name of drug), **then you shall find the defendant not guilty.**

Instruction No. P22.200

Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation

You have found the defendant guilty of the crime of distributing (name of drug), **which is a Schedule** [I; II] **controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-248(A), (C), 54.1-3446, 54.1-3448.

Case Authority:

Austin v. Commonwealth, 33 Va. App. 124, 129, 531 S.E.2d 637, 639 (2000); Dunbar v. Commonwealth, 29 Va. App. 387, 393–94, 512 S.E.2d 823, 826–27 (1999); Stanley v. Commonwealth, 12 Va. App. 867, 869, 407 S.E.2d 13, 15 (1991); Stillwell v. Commonwealth, 219 Va. 214, 222–26, 247 S.E.2d 360, 365–68 (1978); Gardner v. Commonwealth, 217 Va. 5, 7–8, 225 S.E.2d 354, 356 (1976); Brown v. Commonwealth, 215 Va. 753, 753–55, 213 S.E.2d 764, 764–66 (1975); Jefferson v. Commonwealth, 214 Va. 432, 435, 201 S.E.2d 749, 751 (1974); Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202–03 (1973).

Practice Commentary: Absent specific evidence that distribution was for accommodation rather than profit there should be no need to give an accommodation instruction as set forth in Instruction No. 22.240. *King v. Commonwealth, 219 Va. 171, 173–74, 247 S.E.2d 368, 370 (1978).* See also *Brown, 215 Va. at 753–55, 213 S.E.2d at 764–66* (accommodation distribution instruction properly given where evidence was susceptible to interpretation that defendant had intended to make gift of drugs to recipient, but instruction allowing defendant to instead be found guilty of higher offense than accommodation distribution also held properly given where other evidence was susceptible to interpretation that donor and recipient were to share in proceeds of sale of drugs to others).

In *Jefferson*, the Supreme Court of Virginia held that an accommodation instruction was proper where the defendant handed the substance to an individual who, in turn, gave it to a third party, there being no evidence that the defendant received any money. *214 Va. at 434–35, 201 S.E.2d at 751.* This indicates that a mere gift or transfer may be considered accommodation where the recipient has a pre-existing desire to use the drug unless the defendant has induced or stimulated the recipient's desire or need for the drug. *Id.*; see also *Gardner, 217 Va. at 7–8, 225 S.E.2d at 356.* The statutory language regarding accommodation is contained in Va. Code Ann. § 18.2-248(D). For more on use of the accommodation instruction, see the Sources & Authority statement following Instruction No. 22.240.

For a definition of "distribute," see Va. Code Ann. § 54.1-3401 and *Wood, 214 Va. at 99–100, 197 S.E.2d at 202–03.* Distribution may be proven by indirect as well as direct statements. See, e.g., *Dunbar, 29 Va. App. at 389–93, 512 S.E.2d at 824–26*, where defendant admitted selling on other occasions.

See generally Va. Code Ann. § 18.2-474.1 which specifically deals with distribution of a controlled drug to an inmate in the penal system.

Subsections H1 and H2 of Va. Code Ann. § 18.2-248 give enhanced punishment to organizers, etc. of criminal drug enterprises depending on the gross receipts and

quantity. The mandatory minimum sentences for these offenses range from twenty (20) years to life.

Transporting certain large quantities into Virginia for distribution or sale is a separate offense under Va. Code Ann. § 18.2-248.01. The offense is committed even though the ultimate destination is not Virginia. *Seke v. Commonwealth, 24 Va. App. 318, 323, 482 S.E.2d 88, 90 (1997).* See Instruction No. 22.910. Possession of a controlled substance is a lesser-included offense of distribution. *Austin, 33 Va. App. at 129, 531 S.E.2d at 639.*

In *Stillwell*, the Supreme Court of Virginia found Code § 18.2-248 to be constitutional, inasmuch as it does not impermissibly shift the burden of proof to an accused with respect to establishment of an accommodation distribution as a means of decreasing the applicable penalty. *219 Va. at 222–26, 247 S.E.2d at 365–68.*

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• See Va. Code Ann. § 54.1-3456 dealing with designer drugs that emulate or simulate the effects of Schedule I or Schedule II controlled substances. See also Instruction No. 22.600 in connection with distribution of a controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving controlled substances on or near the educational or recreational property specified in Va. Code Ann. § 18.2-255.2.

• A defendant may receive an enhanced punishment for selling, giving, or distributing a Schedule I or II controlled substance upon a second conviction of such a violation. Va. Code Ann. § 18.2-248(C). The penalty for a second conviction is not less than 5 years (3 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence) nor more than life and a fine of not more than $500,000. In such event, the instruction should contain an additional element requiring the Commonwealth to prove that the offense is a second offense and the enhanced punishment provision should be substituted for the first offense punishment provision. A person convicted of a third offense is subject to a sentence of 10 years to life imprisonment and a fine of up to $500,000, with 10 years of the sentence being a mandatory minimum term.

• In *Jones v. Commonwealth, 69 Va. App. 582, 589, 822 S.E.2d 19, 22 (2018)*, the Court of Appeals held that any prior conviction of an offense under Va. Code Ann. § 18.2-248, including a conviction as an accommodation under Va. Code Ann. § 18.2-248(D), triggers the enhanced-punishment provisions of Va. Code Ann. § 18.2-248(C).

• The statute makes the mandatory minimum ten year sentence inapplicable if the trial judge finds (1) the person has never been convicted of certain violent felony offenses; (2) the offense did not involve violence, threats, or weapons; (3) no one was injured or killed as a result of the offense; (4) the person did not lead others in the offense and the offense was not a "continuing criminal enterprise"; and (5) not later than the time of the sentencing hearing, the person has truthfully provided to the Commonwealth all information and evidence the person has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. *Sandidge v. Commonwealth, 67 Va. App. 150, 793 S.E.2d 836 (2016)* addresses this statutory provision and what constitutes timely disclosure.

• When the evidence might support a charge of possession as a lesser-included crime, add an instruction on possession as recommended by the Editorial Note in Instruction No. 22.100 and accompanying Case Authority and Practice Commentary.

• Marijuana offenses are covered by Va. Code Ann. § 18.2-248.1. See Instruction No. 22.220, distribution. Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12
MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.220

Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation

The defendant is charged with the crime of distributing more than one-half [one] ounce but not more than five (5) pounds of marijuana. The Commonwealth must prove beyond a reasonable doubt that the defendant distributed more than one-half [one] ounce but not more than five (5) pounds of marijuana.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant distributed marijuana, then you shall find the defendant not guilty.

Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation

one-half [one] ounce but not more than five (5) pounds of marijuana.

[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

Instruction No. P22.220

Marijuana—Selling, Giving, or Distributing: No Evidence of Accommodation

You have found the defendant guilty of the crime of distributing more than one-half [one] ounce but not more than five (5) pounds of marijuana.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Note:

If the charge specifies an amount either one-half [one] ounce or less, or more than five (5) pounds, see the Alerts for the Instruction.

Sources & Authority

Governing Statutes:

Va. Code Ann. § 18.2-248.1.

Case Authority:

Brown v. Commonwealth, 56 Va. App. 8, 11–13, 690 S.E.2d 301, 303 (2010); *Dunbar v. Commonwealth, 29 Va. App. 387, 393–94, 512 S.E.2d 823, 826–27 (1999); Stillwell v. Commonwealth, 219 Va. 214, 222–26, 247 S.E.2d 360, 365–68 (1978); Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202–03 (1973).*

Practice Commentary: Weight of the marijuana is an essential element of the offense. Based on the current definition of marijuana under Va. Code Ann. § 54.1-3401, stalks are considered marijuana only if they are combined with other parts of plants of the genus Cannabis. Under those circumstances, it is proper to include them in determining the total weight. *Brown, 56 Va. App. at 12–13, 690 S.E.2d at 303.*

Absent specific evidence that distribution was for accommodation rather than profit there should be no need to give an accommodation instruction as set forth in Instruction No. 22.260. *King v. Commonwealth, 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978). Porter v. Commonwealth, 66 Va. App. 302, 307–08, 785 S.E.2d 224, 227–28 (2016).*

For a definition of "distribute," see Va. Code Ann. § 54.1-3401 and *Wood, 214 Va. at 99–100, 197 S.E.2d at 202–03*. Distribution may be proven by indirect as well as direct statements. See, e.g., *Dunbar, 29 Va. App. at 389–93, 512 S.E.2d at 824–26*, where defendant admitted selling on prior occasions, thus evidencing an ongoing "general scheme" involving selling cocaine on a regular basis.

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• By amendment effective July 1, 2020, one-half ounce was increased to one ounce in both Va. Code Ann. § 18.2-248.1(a)(1) and (a)(2). The included bracketed word "one" is relevant to, and should be used for, alleged offenses occurring on or after July 1, 2020. Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one

ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Graduated penalties for selling, giving or distributing marijuana have been established. Va. Code Ann. § 18.2-248.1. Selling, giving or distributing more than one-half [one] ounce but less than five pounds is a Class 5 felony, and this punishment provision is used in the instruction.

• If the amount of marijuana is less than one-half [one] ounce or more than five pounds, the amount specified in the charge should be substituted for "more than one-half [one] ounce but less than five pounds" in the first and second sentences of the first paragraph. Selling, giving or distributing one-half [one] ounce or less is a Class 1 misdemeanor, and only punishment provisions (2) through (4) in the punishment instruction should be used in such cases. Selling, giving or distributing more than five pounds is a felony punishable by a specific term of imprisonment, but not less than five (5) years nor more than thirty (30) years, and this provision should be substituted for punishment provisions (1) through (4) of the punishment instruction.

• A person convicted of a third or subsequent felony offense under Va. Code Ann. § 18.2-248.1 is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum term.

• Generally, distribution as an accommodation is a Class 1 misdemeanor. See Instruction No. 22.260. But an accommodation distribution to an inmate of a penal institution is a Class 5 felony. The sale of marijuana by a prisoner in a state, local or community correctional facility is a Class 5 felony. Va. Code Ann. § 53.1-203(6). See also Instruction No. 22.600 in connection with distribution of marijuana to a minor and Instruction No. 22.650 in connection with offenses involving marijuana on or near educational or recreational property; the penalty for these offenses is specified by statute and does not vary based on the amount of marijuana.

• For alleged offenses occurring before July 1, 2020, it is possible that the evidence could support a charge of possession as a lesser-included crime. If so, add an instruction on possession as addressed by the Alert following Instruction No. 22.120.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.240

Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation

The defendant is charged with the crime of distributing (name of drug) **which is a Schedule** [I; II] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant distributed** (name of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant distributed (name of drug), **then you shall find the defendant guilty** [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant distributed (name of drug), **then you shall find the defendant not guilty.**

Instruction No. 2.12.10

Schedule I or II Controlled Substance—Selling, Giving, or Distributing; Evidence of Accommodation

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant distributed (name of drug),

Instruction No. P22.240

Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation

You have found the defendant guilty of the crime of distributing (name of drug) **which is a Schedule** [I; II] **controlled substance.**

In determining the punishment, unless you find that the defendant distributed (name of drug) **only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug), **you shall fix his punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.**

If you have found beyond a reasonable doubt that the defendant distributed (name of drug), **but further find from the greater weight of the evidence that this distribution was done only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug), **then you shall fix his punishment at:**

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(A), (C), (D), 54.1-3446, 54.1-3448.

CASE AUTHORITY:

See Case Authority and Practice Commentary following Instruction No. 22.200.

PRACTICE COMMENTARY: The predecessor statute to Va. Code Ann. § 54.1-3401 has been construed to give a broad definition to "distribute" which includes sale and/or gift. *Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202–03 (1973).*

Once a determination of guilt has been established, there must be a determination of accommodation in the context of punishment. The defendant has the burden of proving by a preponderance of the evidence that the punishment should be an accommodation punishment rather than a distribution punishment. Accommodation is not a separate offense; it is a gradation of the controlled drug distribution offense. *Stillwell v. Commonwealth, 219 Va. 214, 222, 247 S.E.2d 360, 365 (1978); Foster v. Commonwealth, 38 Va. App. 549, 557, 567 S.E.2d 547, 551 (2002)* (holding that "18.2-248(D) establishes a presumption against an accommodation distribution). *Porter v. Commonwealth,* ***66 Va. App. 302, 307–08, 785 S.E.2d 224, 227–28 (2016).***

Evidence of accommodation can come from either defense or Commonwealth witnesses. *Brown v. Commonwealth, 215 Va. 753, 754, 213 S.E.2d 764, 765 (1975).*

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018),* the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• Va. Code Ann. § 18.2-248(D) also contains an accommodation provision relating to possession with intent to distribute. See Instruction No. 22.360. See also Instruction No. 22.600 in connection with distribution of a controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving controlled substances on or near educational or recreational property.

• Accommodation distribution is a Class 5 felony.

• The penalty for a second or subsequent conviction is not less than 5 years (3 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence) nor more than life and a fine of not more than $500,000. A person convicted of a third or subsequent offense is subject to a sentence of 10 years to life imprisonment and a fine of up to $500,000, with 10 years of the sentence being a mandatory minimum term. Va. Code Ann. § 18.2-248(C).

• In *Jones v. Commonwealth, 69 Va. App. 582, 589, 822 S.E.2d 19, 22 (2018)*, the Court of Appeals held that any prior conviction of an offense under Va. Code Ann. § 18.2-248, including a conviction as an accommodation under Va. Code Ann. § 18.2-248(D), triggers the enhanced-punishment provisions of Va. Code Ann. § 18.2-248(C).

• When it is possible that the evidence might support a charge of possession as a lesser-included crime, add an instruction on possession as recommended by the Editorial Note to Instruction No. 22.100 and accompanying Case Authority and Practice Commentary.

• Marijuana distribution offenses are covered by Va. Code Ann. § 18.2-248.1. See Instruction No. 22.260. Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Va. Code Ann. § 54.1-3443(D). Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.260

Marijuana—Selling, Giving, or Distributing: Evidence of Accommodation

The defendant is charged with the crime of distributing more than one-half [one] ounce but not more than five (5) pounds of marijuana. The Commonwealth must prove beyond a reasonable doubt that the defendant distributed more than one-half [one] ounce but not more than five (5) pounds of marijuana.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant distributed more than one-half [one] ounce but not more than five (5) pounds of marijuana, then you shall find the defendant guilty [but you shall not fix the punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant distributed marijuana, then you shall find the defendant not guilty.

Instruction No. P22.260

Marijuana—Selling, Giving, or Distributing: Evidence of Accommodation

You have found the defendant guilty of distributing more than one-half [one] ounce but not more than five (5) pounds of marijuana.

In determining the punishment, unless you find that the defendant distributed marijuana only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon marijuana, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

If you have found beyond a reasonable doubt that the defendant distributed such quantity of marijuana, but further find from the greater weight of the evidence that this was done only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon marijuana, then you shall fix his punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Note:

If the charge specifies an amount of either one-half [one] ounce or less, or more than five (5) pounds, see the Alerts for the Instruction.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.1.

CASE AUTHORITY:

Porter v. Commonwealth, 66 Va. App. 302, 307–08, 785 S.E.2d 224, 227–28 (2016); *Brown v. Commonwealth, 56 Va. App. 8, 11–13, 690 S.E.2d 301, 303 (2010)*; *Foster v. Commonwealth, 38 Va. App. 549, 557, 567 S.E.2d 547, 551 (2002); Hudspith v. Commonwealth, 17 Va. App. 136, 137–38, 435 S.E.2d 588, 589–90 (1993); King v. Commonwealth, 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978); Stillwell v. Commonwealth, 219 Va. 214, 225, 247 S.E.2d 360, 367 (1978); Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202 (1973).*

PRACTICE COMMENTARY: Weight of the marijuana is an essential element of the offense. Based on the current definition of marijuana under Va. Code Ann. § 54.1-3401, stalks are considered marijuana if they are combined with other parts of the plant genus Cannabis. It is proper to include them in determining the total weight. *Brown. 56 Va. App. at 12–13, 690 S.E.2d at 303.*

The predecessor statute to Va. Code Ann. § 54.1-3401 has been construed to give a broad definition to "distribute" which includes sale and/or gift. *Wood, 214 Va. at 99–100, 197 S.E.2d at 202.*

Once a determination of guilt has been established, there must be a determination of accommodation in the context of punishment. The defendant has the burden of proving by a preponderance of the evidence that the punishment should be an accommodation punishment rather than a distribution offense. *Stillwell, 219 Va. at 225, 247 S.E.2d at 367; Hudspith v. Commonwealth, 17 Va. App. at 137–38, 435 S.E.2d at 589–90; Foster, 38 Va. App. at 557, 567 S.E.2d at 551.*

An instruction on accommodation should not be given unless there is credible evidence that the transfer of marijuana from one person to another was not a commercial transaction. *King, 219 Va. at 174, 247 S.E.2d at 370.*

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• By amendment effective July 1, 2020, one-half ounce was increased to one ounce in both Va. Code Ann. § 18.2-248.1(a)(1) and (a)(2). The included bracketed word "one" is relevant to, and should be used for, alleged offenses occurring on or after July 1, 2020. For offenses occurring on or after July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an

amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. See additional Alert below. Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• Graduated penalties for selling, giving or distributing marijuana have been established. Va. Code Ann. § 18.2-248.1. Selling, giving or distributing more than one-half [one] ounce but less than five pounds is a Class 5 felony, and this punishment provision is used in the instruction.

• If the amount of marijuana is less than one-half ounce for offenses occurring prior to July 1, 2020, less than one ounce for offenses occurring on or after July 1, 2020 and before July 1, 2021, or more than five pounds, the amount specified in the charge should be substituted for "more than one-half [one] ounce but less than five pounds" in the first, second and third paragraphs. For offenses occurring prior to July 1, 2021, selling, giving or distributing one-half [one] ounce or less is a Class 1 misdemeanor and only punishment provisions (2) through (4) in the instruction should be used in such cases. Selling, giving or distributing more than five pounds is a felony punishable by a specific term of imprisonment, but not less than five (5) nor more than thirty (30) years and a fine not to exceed $10,000, and this provision should be substituted for punishment provisions (1) through (4) of the model instruction. A person convicted of a third or subsequent felony offense is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum term. Va. Code Ann. § 18.2-248.1(d).

• Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Generally, distribution as an accommodation is a Class 1 misdemeanor, but an accommodation distribution to an inmate of a penal institution is a Class 4 felony. Va. Code Ann. § 18.2-248.1(b). The sale of marijuana by a prisoner in a state, local or community correctional facility is a Class 5 felony. Va. Code Ann. § 53.1-203(6). See also Instruction No. 22.600 in connection with distribution of marijuana to a minor and Instruction No. 22.650 in connection with offenses involving marijuana on or near educational or recreational property; the penalty for these offenses is specified by statute and does not vary based on the amount of

marijuana.

• For alleged offenses occurring before July 1, 2020, it is possible that the evidence could support a charge of possession as a lesser-included crime. If so, add an instruction on possession as addressed by the Alert following Instruction No. 22.120.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.270

Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—28 Grams or More—§ 18.2-248.03(A)

The defendant is charged with the crime of [manufacturing; selling, giving, or distributing; possessing with intent to manufacture, sell, give, or distribute] **methamphetamine. The Commonwealth must prove beyond a reasonable doubt that the defendant** [manufactured; sold, gave, or distributed; possessed with intent to manufacture, sell, give, or distribute] **28 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [manufactured; sold, gave, or distributed; possessed with intent to manufacture, sell, give, or distribute] **28 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, then you shall find the defendant not guilty.**

amount of methamphetamine, its salts, isomers, or salts of its isomers,

reasonable doubt the crime as charged, then you shall find the defendant guilty

doubt that the defendant [manufactured, sold, gave, or distributed, possessed with intent to [manufacture, sell, give, or distribute] 28 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, then you shall find the defendant not guilty.

Instruction No. P22.270

Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—28 Grams or More—§ 18.2-248.03(A)

You have found the defendant guilty of the crime of [manufacturing; selling, giving, or distributing; possessing with intent to manufacture, sell, give, or distribute] **methamphetamine.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.03(A).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: There is no specific Practice Commentary for this instruction. The practitioner may wish to review the Practice Commentaries for Instruction Nos. 22.100 (Schedule I or II Controlled Substance—Manufacturing), 22.200 (Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation), 22.300 (Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation), 22.330 (Knowing and Intentional Possession—Definition) and 22.350 (Intent to Distribute—Factors to Be Considered in Determining).

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• While Va. Code Ann. § 18.2-248(D) provides for the defense of accommodation for the distribution or the possession with the intent to distribute lesser quantities of methamphetamine, Va. Code Ann. § 18.2-248.03 provides for no such defense.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.275

Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—227 Grams or More—§ 18.2-248.03(B)

The defendant is charged with the crime of [manufacturing; selling, giving, or distributing; possessing with intent to manufacture, sell, give, or distribute] **methamphetamine. The Commonwealth must prove beyond a reasonable doubt that the defendant** [manufactured; sold, gave, or distributed; possessed with intent to manufacture, sell, give, or distribute] **227 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [manufactured; sold, gave, or distributed; possessed with intent to manufacture, sell, give, or distribute] **227 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers, then you shall find the defendant not guilty.**

Instruction No. P22.275

Methamphetamine—Manufacturing, Selling, Giving, Distributing, Possessing with Intent—227 Grams or More—§ 18.2-248.03(B)

You have found the defendant guilty of the crime of [manufacturing; selling, giving, or distributing; possessing with intent to manufacture, sell, give, or distribute] **methamphetamine.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than life and a fine of a specific amount, but not more than $1 million.

Sources & Authority

Governing Statutes:

Va. Code Ann. § 18.2-248.03(B).

Case Authority:

None.

Practice Commentary: There is no specific Practice Commentary for this instruction. The practitioner may wish to review the Practice Commentaries for Instruction Nos. 22.100 (Schedule I or II Controlled Substance—Manufacturing), 22.200 (Schedule I or II Controlled Substance—Selling, Giving, or Distributing: No Evidence of Accommodation), G22.300 (Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation), 22.330 (Knowing and Intentional Possession—Definition) and 22.350 (Intent to Distribute—Factors to Be Considered in Determining).

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

• While Va. Code Ann. § 18.2-248(D) provides for the defense of accommodation for the distribution or the possession with the intent to distribute less than 28 grams of methamphetamine, Va. Code Ann. § 18.2-248.03 provides for no such defense.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Drug Offenses"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 20.1–20.12

Michie's Jurisprudence, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.277

Manufacturing Methamphetamine While a Minor or Incapacitated Person is Present

The defendant is charged with the crime of [manufacturing; attempting to manufacture] **methamphetamine while a minor or incapacitated person is present. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

1. **That the defendant** [manufactured; attempted to manufacture] **methamphetamine;**
2. **That** (name of minor) **was present in the same** [dwelling; apartment; unit of a hotel; garage; shed; vehicle; (describe other location)] **during the** [manufacture; attempted manufacture] **of methamphetamine;**
3. **That during the** [manufacture; attempted manufacture] (name of minor) **was** [a minor under the age of 15; a minor 15 years of age or older with whom the defendant maintained a custodial relationship; a mentally incapacitated or physically helpless person of any age]**; and**
4. **That the defendant, during the** [manufacture; attempted manufacture] **was at least 18 years of age.**

If you find from the evidence that the Commonwealth has proved each of the elements of the crime set out above beyond a reasonable doubt, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you].

If you find that the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P22.277

Manufacturing Methamphetamine While a Minor or Incapacitated Person is Present

You have found the defendant guilty of the crime of [manufacturing; attempting to manufacture] **methamphetamine while a minor or incapacitated person is present.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than ten (10) years nor more than forty (40) years.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.02.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The penalty for such a conviction shall be served consecutively with any other sentence. Va. Code Ann. § 18.2-248.02.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.280

Profit—Definition

The word "profit" as used in this case does not necessarily mean that the defendant made money or received more value than he gave for the drug but is used to indicate a commercial transaction.

SOURCES & AUTHORITY

GOVERNING STATUTES:

None.

CASE AUTHORITY:

Hudspith v. Commonwealth, 17 Va. App. 136, 138, 435 S.E.2d 588, 590 (1993); King v. Commonwealth, 219 Va. 171, 174, 247 S.E.2d 368, 370 (1978); Stillwell v. Commonwealth, 219 Va. 214, 218–20, 247 S.E.2d 360, 363–64 (1978); Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202 (1973).

PRACTICE COMMENTARY: In *King*, the defendant was convicted of violating Va. Code Ann. § 18.2-248. In construing the statute, the Supreme Court of Virginia said that the word "profit" does not mean that the seller must sell his drugs for a price in excess of the amount he paid; rather, it is used to indicate a commercial transaction involving consideration. *219 Va. at 174, 247 S.E.2d at 370.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.300

Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation

The defendant is charged with the crime of possession with intent to [distribute; manufacture] (name of drug) **which is a Schedule** [I; II] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed with intent to** [distribute; manufacture] (name of drug)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty of possession with intent to [distribute; manufacture] (name of drug) [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

[If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant possessed (name of drug) but you do not find beyond a reasonable doubt that the defendant intended to [distribute; manufacture] (name of drug), then you shall find the defendant guilty of possession of (name of drug) (but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you)].

[If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above offenses, then you shall find the defendant not guilty.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed with intent to [distribute; manufacture] (name of drug)**, then you shall find the defendant not guilty.**

Note:

When the jury may find from the evidence that the defendant possessed the controlled substance but did not intend to distribute or manufacture it, the bracketed paragraphs should be included in the instruction and the last paragraph should be deleted.

either of the above offenses, then you shall find the defendant not guilty.

When the jury may find from the evidence that the defendant possessed the controlled substance but did not intend to distribute or manufacture it, the bracketed paragraphs should be included in the instruction and the last paragraph should be deleted.

Instruction No. P22.300

Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation

You have found the defendant guilty of the crime of possession with intent [to distribute; to manufacture] (name of drug) **which is a Schedule** [I; II] **controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(A), (C), 18.2-250, 54.1-3446, 54.1-3448.

CASE AUTHORITY:

Gregory v. Commonwealth, 64 Va. App. 87, 98–99, 764 S.E.2d 732, 737–38 (2014); *Merritt v. Commonwealth, 57 Va. App. 542, 555–57, 704 S.E.2d 158, 164–65 (2011)*; *McMillan v. Commonwealth. 277 Va. 11, 19–20, 671 S.E.2d 396, 399–400 (2009)*; *Maxwell v. Commonwealth, 275 Va. 437, 442–44, 657 S.E.2d 499, 502–03 (2008)*; *Christian v. Commonwealth, 33 Va. App. 704, 715–16, 536 S.E.2d 477, 483 (2000)*; *Shackleford v. Commonwealth, 32 Va. App. 307, 325–28, 528 S.E.2d 123, 132–33 (2000)*; *Clarke v. Commonwealth, 32 Va. App. 286, 304–05, 527 S.E.2d 484, 493 (2000)*; *Seke v. Commonwealth, 24 Va. App. 318, 323, 482 S.E.2d 88, 90 (1997)*; *Davis v. Commonwealth, 12 Va. App. 728, 732–34, 406 S.E.2d 922, 924–25 (1991)*; *Harrison v. Commonwealth, 12 Va. App. 581, 584–85, 405 S.E.2d 854, 856–57 (1991)*; *Lane v. Commonwealth, 223 Va. 713, 716–17, 292 S.E.2d 358, 360 (1982)*; *Eckhart v. Commonwealth, 222 Va. 447, 450–51, 281 S.E.2d 853, 855–56 (1981)*; *Dutton v. Commonwealth, 220 Va. 762, 763–65, 263 S.E.2d 52, 53–55 (1980)*; *Colbert v. Commonwealth, 219 Va. 1, 3–4, 244 S.E.2d 748, 749–50 (1978)*; *Buono v. Commonwealth, 213 Va. 475, 476, 193 S.E.2d 798, 798–99 (1973)*; *Sharp v. Commonwealth, 213 Va. 269, 270–72, 192 S.E.2d 217, 218–19 (1972)*.

PRACTICE COMMENTARY: The word "distribute" is used in the above instruction rather than the words "sell, give or distribute." Since the crime charged occurs prior to any act of sale, gift or distribution and since "distribute" covers sale and gift, the use of "distribute" is sufficient. *Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202 (1973)*.

Possession with intent to manufacture is not a lesser-included offense of manufacturing. *Spear v. Commonwealth, 221 Va. 450, 454–58, 270 S.E.2d 737, 740–42 (1980)*. One intending to manufacture a controlled substance might "purchase a controlled substance from another and have it in his possession together with all the chemicals, ingredients, equipment, and paraphernalia necessary to manufacture that substance." *221 Va. at 457, 270 S.E.2d at 741–42*.

Knowing and intentional possession is defined in Instruction No. 22.330. See the cases cited in the Case Authority and Practice Commentary for a discussion of the facts and circumstances that constitute possession. This instruction should be given when possession of a Schedule I or II drug is an issue.

The definition of intent to distribute is contained in Instruction No. 22.350. The factors to be considered in determining intent to distribute are set forth in Instruction No. 22.350. See the cases cited in the Case Authority and Practice Commentary for a discussion of the factors to be considered in determining intent to distribute. This instruction should also be given if intent to distribute is an issue.

In *Seke v. Commonwealth, 24 Va. App. 318, 323, 482 S.E.2d 88, 90 (1997)*, the

convictions of defendant for possession in Virginia under Va. Code Ann. § 18.2-248 and transporting into Virginia under Va. Code Ann. § 18.2-248.1 were upheld where defendant contended that the drug was only being transported through Virginia.

See Instruction No. 22.600 relating to distribution of a controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving controlled substances on or near educational or recreational property.

Shared constructive possession of drugs by an accused does not necessarily establish shared intent on the part of that individual to distribute them. As the Court of Appeals held in *Harrison*, "a person may constructively possess drugs owned by another" and thus, "under certain circumstances, one party in possession of controlled substances may intend to distribute them, while another person who constructively possesses the same substances because they are subject to his dominion and control may not share the intent to distribute the substances." *12 Va. App. at 585, 405 S.E.2d at 857.*

For examples of a defendant who resides at the location from which the illegal drugs are distributed and who is charged as a principal in the second degree, compare *Brickhouse v. Commonwealth, 276 Va. 682, 668 S.E.2d 160 (2008)* (evidence insufficient) with *Dunn v. Commonwealth, 52 Va. App. 611, 665 S.E.2d 868 (2008)* (evidence sufficient for conviction).

Intent to distribute may not be presumed based solely on evidence as to quantity of drugs seized. Instead, possession of a large quantity of drugs may be considered as one factor among all other relevant facts and circumstances to infer intent to distribute. *Sharp, 213 Va. at 270–72, 192 S.E.2d at 218–19.* But see *Hunter v. Commonwealth, 213 Va. 569, 570, 193 S.E.2d 779, 780 (1973)* (discussing *Sharp* and holding that quantity may be considered along with other circumstances to support an inference of intent to distribute, and that quantity alone, under certain circumstances, may be sufficient to support an inference of intent to distribute).

ALERTS:

• A defendant may receive an enhanced punishment for selling, giving, or distributing a Schedule I or II controlled substance upon a second conviction of such a violation. Va. Code Ann. § 18.2-248(C). The penalty for a second conviction is not less than 5 years (3 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence) nor more than life and a fine of not more than $500,000. In such event, the instruction should contain an additional element requiring the Commonwealth to prove that the offense is a second offense and the enhanced punishment provision should be substituted for the first offense punishment provision.

• A person convicted of a third or subsequent offense is subject to a sentence of 10 years to life imprisonment and a fine of up to $500,000, with 10 years of the sentence being a mandatory minimum term.

• In *Jones v. Commonwealth, 69 Va. App. 582, 589, 822 S.E.2d 19, 22 (2018),*

the Court of Appeals held that any prior conviction of an offense under Va. Code Ann. § 18.2-248, including a conviction as an accommodation under Va. Code Ann. § 18.2-248(D), triggers the enhanced-punishment provisions of Va. Code Ann. § 18.2-248(C).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.310

Marijuana—Possession With Intent to Manufacture—Not for Own Use

The defendant is charged with the crime of possession with intent to manufacture marijuana not for his own use. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed marijuana with intent to manufacture it not for his own use.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed marijuana with intent to manufacture it not for his own use, then you shall find the defendant not guilty.

Instruction No. P22.310

Marijuana—Possession With Intent to Manufacture—Not for Own Use

You have found the defendant guilty of the crime of possession with intent to manufacture marijuana not for his own use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at confinement in the penitentiary for a specific term, but not less than five (5) years nor more than thirty (30) years and a fine of a specific amount, but not more than $10,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.1.

CASE AUTHORITY:

Cooper v. Commonwealth, 54 Va. App. 558, 573–75, 680 S.E.2d 361, 369 (2009); *King v. Commonwealth, 2 Va. App. 708, 709–11, 347 S.E.2d 530, 530–31 (1986).*

PRACTICE COMMENTARY: In *King v. Commonwealth, 2 Va. App. 708, 709–10, 347 S.E.2d 530, 530–31 (1986)*, the Court of Appeals held appropriate an instruction incorporating the definition of manufacture contained in the Drug Control Act [now § 54.1-3401] in a prosecution for feloniously manufacturing marijuana. See also *Cooper, 54 Va. App. at 573–74, 680 S.E.2d at 369.*

The accommodation provision in Va. Code Ann. § 18.2-248.1 refers only to instances where the defendant "gave, distributed or possessed with intent to give or distribute," making no reference to manufacturing or to possession with intent to manufacture.

The definition of knowing and intentional possession is contained in Instruction No. 22.330. The cases cited in the Case Authority and the Practice Commentary contain a discussion to the facts and circumstances that constitute possession. This instruction should also be given if possession is an issue.

Drug paraphernalia and narcotics scattered throughout the house, disparate drugs, stolen firearms, packaging of drugs, and expert testimony were sufficient to find that the defendant manufactured marijuana not for his own use. *Cooper, 54 Va. App. at 574, 680 S.E.2d at 369.*

ALERTS:

• By amendment effective July 1, 2020, one-half ounce is increased to one ounce in both Va. Code Ann. § 18.2-248.1 (a)(1) and (a)(2). Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• The Cannabis Control Act, Va. Code Ann. § 4.1-600, *et seq.*, effective July 1, 2021, provides the following definition for "manufacturing" or "manufacture" of marijuana or marijuana products:

> 'Manufacturing' or 'manufacture' means the production of marijuana products or the blending, infusing, compounding, or other preparation of marijuana and marijuana products, including marijuana extraction or preparation by means of chemical synthesis. 'Manufacturing' or 'manufacture' does not include cultivation or testing.

Va. Code Ann. § 4.1-600. Additionally, effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana

plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

• For alleged offenses occurring before July 1, 2020, it is possible that the evidence could support a charge of possession as a lesser-included crime. If so, add an instruction on possession as addressed by the Alert following Instruction No. 22.120.

• A person convicted of a third or subsequent felony offense under § 18.2-248.1(d) is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum term.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.320

Marijuana—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation

The defendant is charged with the crime of possession with intent to distribute more than one-half [one] ounce but not more than five (5) pounds of marijuana. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed with intent to distribute more than one-half [one] ounce but not more than five (5) pounds of marijuana.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed with intent to distribute marijuana, then you shall find the defendant not guilty.

Note:

If the charge specifies an amount, either one-half [one] ounce or less, or more than five (5) pounds, see the Alerts for the Instruction.

Instruction No. P22.320

Marijuana—Possession With Intent to Sell, Give, or Distribute: No Evidence of Accommodation

You have found the defendant guilty of the crime of possession with intent to distribute more than one-half [one] ounce but not more than five (5) pounds of marijuana.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.1.

CASE AUTHORITY:

Gregory v. Commonwealth, 64 Va. App. 87, 100–01, 764 S.E.2d 732, 738–39 (2014); *Ervin v. Commonwealth, 57 Va. App. 495, 503–23, 704 S.E.2d 135, 139–48 (2011)*; *Brown v. Commonwealth, 56 Va. App. 8, 11–13, 690 S.E.2d 301, 303 (2010)*; *McMillan v. Commonwealth, 277 Va. 11, 19, 671 S.E.2d 396, 400 (2009)*; *Hargrove v. Commonwealth, 53 Va. App. 545, 557–59, 673 S.E.2d 896, 902–03 (2009)*; *Stillwell v. Commonwealth, 219 Va. 214, 222–26, 247 S.E.2d 360, 365–68 (1978)*; *Brown v. Commonwealth, 215 Va. 753, 753–55, 213 S.E.2d 764, 764–66 (1975)*; *Wood v. Commonwealth, 214 Va. 97, 99–100, 197 S.E.2d 200, 202–03 (1973)*.

PRACTICE COMMENTARY: Absent specific evidence that distribution was for accommodation rather than profit, there should be no need to give an accommodation instruction. *King v. Commonwealth, 219 Va. 171, 173–74, 247 S.E.2d 368, 370 (1978)*. *Porter v. Commonwealth, 66 Va. App. 302, 308–09, 785 S.E.2d 224, 227–28 (2016)*. See also *Brown, 215 Va. at 753–55, 213 S.E.2d at 764–66* (accommodation distribution instruction properly given where evidence was susceptible to interpretation that defendant had intended to make gift of drugs to recipient, but instruction allowing defendant to instead be found guilty of higher offense than accommodation distribution also held properly given where other evidence was susceptible to interpretation that donor and recipient were to share in proceeds of sale of drugs to others).

For a definition of "distribute," see Va. Code Ann. § 54.1-3401 and *Wood, 214 Va. at 99–100, 197 S.E.2d at 202–03*. The instruction and this Case Authority and Practice Commentary, therefore, use "distribute" and "distribution" to include both sale, gift, exchange and barter.

While Code § 18.2-248.1(a)(3) requires proof of the amount of marijuana, actual knowledge of the exact quantity is not critical to the drug quantity determination. *Hargrove v. Commonwealth, 53 Va. App. 545, 558, 673 S.E.2d 896, 902 (2009)*.

Weight of the marijuana is an essential element of the offense. Based on the current definition of marijuana under Va. Code Ann. § 54.1-3401, stalks are considered marijuana only if they are combined with other parts of plants of the genus Cannabis. Under those circumstances, it is proper to include them in determining the total weight. *Brown, 56 Va. App. at 12–13, 690 S.E.2d at 303*.

The definition of knowing and intentional possession is contained in Instruction No. 22.330. The cases in the Case Authority and the Practice Commentary contain a discussion of the facts and circumstances that constitute possession. The definition of possession should normally be given with this instruction.

The definition of intent to distribute is given in Instruction No. 22.350. The cases in the Case Authority and the Practice Commentary contain a discussion of the

facts and circumstances that constitute intent to distribute. The definition of intent to distribute should normally be given with this instruction.

ALERTS:

• By amendment effective July 1, 2020, one-half ounce is increased to one ounce in both Va. Code Ann. § 18.2-248.1(a)(1) and (a)(2). The included bracketed word "one" is relevant to, and should be used for, alleged offenses occurring on or after July 1, 2020. Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Graduated penalties for possession with intent to distribute marijuana have been established. Va. Code Ann. § 18.2-248.1. Possession with intent to distribute more than one-half [one] ounce but less than five pounds is a Class 5 felony, and this punishment provision is used in the instruction.

• If the amount of marijuana is less than one-half [one] ounce or more than five pounds, the amount specified in the charge should be substituted for "more than one-half [one] once but less than five pounds" in the first and second sentences of the first paragraph. Possession with intent to distribute one half [one] ounce or less is a Class 1 misdemeanor and only punishment provisions (2) through (4) in the instruction should be used in such cases. Possession with intent to distribute more than five pounds is a felony punishable by a specific term of imprisonment, but not less than five (5) years nor more than thirty (30) years, and this provision should be substituted for punishment provisions (1) through (4) of the model instruction. A person convicted of a third or subsequent offense is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum sentence.

• Generally, possession with intent to distribute as an accommodation is a Class 1 misdemeanor. See Instruction No. 22.370. But possession with intent to distribute as an accommodation to an inmate of a penal institution is a Class 4 felony. Va. Code Ann. § 18.2-248.1(b). See generally Va. Code Ann. § 18.2-474.1 which specifically deals with distribution of a controlled drug to an inmate in the penal system.

• A prisoner in a state, local, or community correctional facility who procures,

sells, secretes or possesses marijuana is guilty of a Class 5 felony. Va. Code Ann. § 53.1-203(6). See also Instruction No. 22.600 in connection with distribution of marijuana to a minor and Instruction No. 22.650 in connection with offenses involving marijuana on or near educational or recreational property; the penalty for these offenses is specified by statute and does not vary based on the amount of marijuana.

• For alleged offenses occurring before July 1, 2020, it is possible that the evidence could support a charge of possession as a lesser-included crime. If so, add an instruction on possession as addressed by the Alert following Instruction No. 22.120.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.330

Knowing and Intentional Possession—Definition

To knowingly and intentionally possess a controlled substance means that a person is aware of the presence and character of the substance and has actual physical possession or constructive possession. Actual physical possession means that the substance is found on the person. Constructive possession means that the person has dominion and control over the substance. Mere proximity is not enough.

Possession need not be exclusive; it may be shared with another. The length of time of the possession is not material.

Ownership or occupancy of the [premises; vehicle; (describe other location)] **in which a controlled substance is found does not create a presumption that the owner or occupant either knowingly or intentionally possessed such substance. Such ownership or occupancy is a fact which may be considered with other evidence.**

Possession may be proved by acts, declarations or conduct of the defendant from which it may be fairly inferred that he was aware of the presence and character of the substance at the place found.

Sources & Authority

Governing Statutes:

None.

Principal Case Authority:

Sierra v. Commonwealth, 59 Va. App. 770, 776–84, 722 S.E.2d 656, 658–63 (2012); *Merritt v. Commonwealth, 57 Va. App. 542, 555–57, 704 S.E.2d 158, 164–65 (2011)*; *McMillan v. Commonwealth, 277 Va. 11, 19–20, 671 S.E.2d 396, 400 (2009)*; *Young v. Commonwealth, 275 Va. 587, 591–92, 659 S.E.2d 308, 310–11 (2008)*; *Coward v. Commonwealth, 48 Va. App. 653, 656–60, 633 S.E.2d 752, 753–55 (2006)*; *Wilson v. Commonwealth, 272 Va. 19, 26–28, 630 S.E.2d 326, 330–31 (2006)*; *Walton v. Commonwealth, 255 Va. 422, 426, 497 S.E.2d 869, 871–72 (1998)*; *Wright v. Commonwealth, 217 Va. 669, 670–71, 232 S.E.2d 733, 734 (1977)*; *Andrews v. Commonwealth, 216 Va. 179, 181–82, 217 S.E.2d 812, 814 (1975)*; *Burton v. Commonwealth, 215 Va. 711, 713, 213 S.E.2d 757, 758–59 (1975)*; *Buono v. Commonwealth, 213 Va. 475, 476, 193 S.E.2d 798, 798–99 (1973)*; *Huvar v. Commonwealth, 212 Va. 667, 668–69, 187 S.E.2d 177, 178 (1972)*.

Other Relevant Decisions:

Yerling v. Commonwealth, 71 Va. App. 527, 532–33, 838 S.E.2d 66, 68–69 (2020); *Turner v. Commonwealth, 65 Va. App. 312, 330–31, 777 S.E.2d 569, 578–79 (2015)*; *Hylton v. Commonwealth, 60 Va. App. 50, 58–59, 723 S.E.2d 628, 632–33 (2012)*; *Christian v. Commonwealth, 59 Va. App. 603, 608–14, 721 S.E.2d 809, 811–15 (2012)*; *Ervin v. Commonwealth, 57 Va. App. 495, 504–18, 704 S.E.2d 135, 139–47 (2011)*; *Cordon v. Commonwealth, 280 Va. 691, 696, 701 S.E.2d 803, 806 (2010)*; *Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009)*; *Maxwell v. Commonwealth, 275 Va. 437, 443–44, 657 S.E.2d 499, 503 (2008)*; *Ward v. Commonwealth, 47 Va. App. 733, 751–53, 627 S.E.2d 520, 529–30 (2006)*; *Wilson v. Commonwealth, 46 Va. App. 408, 432–37, 617 S.E.2d 431, 443–45 (2005)*; *Birdsong v. Commonwealth, 37 Va. App. 603, 607–10, 560 S.E.2d 468, 470–71 (2002)*; *Lowe v. Commonwealth, 36 Va. App. 163, 167–68, 548 S.E.2d 904, 905–06 (2001)*; *Austin v. Commonwealth, 33 Va. App. 124, 129, 531 S.E.2d 637, 639 (2000)*; *Shackleford v. Commonwealth, 32 Va. App. 307, 325–28, 528 S.E.2d 123, 132–33 (2000)*; *Haskins v. Commonwealth, 31 Va. App. 145, 150–52, 521 S.E.2d 777, 779–80 (1999)*; *McNair v. Commonwealth, 31 Va. App. 76, 85–88, 521 S.E.2d 303, 308–09 (1999)*; *Hunley v. Commonwealth, 30 Va. App. 556, 562–64, 518 S.E.2d 347, 350–51 (1999)*; *Brown v. Commonwealth, 15 Va. App. 1, 7–10, 421 S.E.2d 877, 881–83 (1992)*; *Stanley v. Commonwealth, 12 Va. App. 867, 869–72, 407 S.E.2d 13, 14–16 (1991)*; *Davis v. Commonwealth, 12 Va. App. 728, 732–34, 406 S.E.2d 922, 924–25 (1991)*; *Drew v. Commonwealth, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986)*; *Powers v. Commonwealth, 227 Va. 474, 476–77, 316 S.E.2d 739, 740 (1984)*; *Garland v. Commonwealth, 225 Va. 182, 184, 300 S.E.2d 783, 784–85 (1983)*; *Lane v. Commonwealth, 223 Va. 713, 716–17, 292 S.E.2d 358, 360 (1982)*; *Eckhart v. Commonwealth, 222 Va. 447, 450–51, 281*

S.E.2d 853, 855–56 (1981); Womack v. Commonwealth, 220 Va. 5, 7–8, 255 S.E.2d 351, 352–53 (1979); Adkins v. Commonwealth, 217 Va. 437, 438–40, 229 S.E.2d 869, 870–71 (1976); Hemming v. Commonwealth, 215 Va. 140, 140–42, 207 S.E.2d 831, 832–33 (1974); Gordon v. Commonwealth, 212 Va. 298, 300–01, 183 S.E.2d 735, 737 (1971); Ritter v. Commonwealth, 210 Va. 732, 741, 173 S.E.2d 799, 805–06 (1970).

PRACTICE COMMENTARY: Actual or constructive possession alone is not sufficient for a conviction. *Young, 275 Va. at 591, 659 S.E.2d at 310*; *Burton, 215 Va. at 713, 213 S.E.2d at 759*. Knowledge is an essential element of the crime, and the Commonwealth must prove beyond a reasonable doubt that the possession of the drug is knowing and intentional. *Young, 275 Va. at 591, 659 S.E.2d at 310*. However a defendant need know only that he is possessing a controlled substance to be guilty of violating Va. Code Ann. § 18.2-250 and need not know the precise identity of the controlled substance of which he is in possession. *Sierra, 59 Va. App. 782–83, 722 S.E.2d at 662*.

Actual possession of an illegal drug is not sufficient for a conviction unless there is knowing and intentional possession. *Buono, 213 Va. at 476, 193 S.E.2d at 798–99*. For example, in *Burton* a defendant delivered clothes in which drugs were concealed to a jail inmate. Even though the defendant actually possessed the drugs, the evidence was insufficient for a conviction because it was not proven that the possession was knowing and intentional. *Burton, 215 Va. at 713, 213 S.E.2d at 759*. Likewise, where a defendant picked up a package containing marijuana addressed to him at a bus station, the evidence was not sufficient to establish knowledge of its contents. *Buono, 213 Va. at 476, 193 S.E.2d at 798–99*. However, where a defendant picked up a clear bag containing what defendant thought was drugs from which he could profit, the evidence was sufficient to establish defendant's knowledge. *Christian, 59 Va. App. at 613–14, 721 S.E.2d at 814*.

Knowing and intentional possession may be shown by circumstantial evidence such as the distinctive odor or appearance of the drug, the acts and conduct of the defendant, and the conduct and statements of others. *Walton, 255 Va. at 426, 497 S.E.2d at 872*; *Jordon v. Commonwealth, 273 Va. 639, 645–46, 643 S.E.2d 166, 170 (2007)*. For instance, use of a fictitious name, statements of the defendant, packaging, prior conduct, and odor in addition to actual possession, were sufficient to establish knowledge and intent. *Ward, 47 Va. App. at 752–53, 627 S.E.2d at 529–30*.

The circumstances surrounding the possession of an illegal drug are particularly important in a constructive possession case. *Merritt, 57 Va. App. at 556, 704 S.E.2d at 164*. In constructive possession cases, not only must the Commonwealth establish knowing and intentional possession, but it must prove that a defendant is aware of the presence and character of the substance and that it is subject to his dominion and control. *Andrews, 216 Va. at 182, 217 S.E.2d at 814*. Mere proximity to a controlled drug is not sufficient to convict for possession. *Wright, 217 Va. at 670–71, 232 S.E.2d at 734*; *Huvar, 212 Va. at 668–69, 187 S.E.2d at 178*. For

instance, in *Merritt*, the defendant was merely a passenger in vehicle along with other persons. *Merritt v. Commonwealth, 55 Va. App. 719, 736, 689 S.E.2d 757, 766 (2010).*

Ownership or occupancy of the vehicle or premises containing illegal drugs are a circumstance that may be considered along with other evidence to show that a defendant exercised sufficient dominion and control over the drugs to constitute constructive possession. *Coward, 48 Va. App. at 658, 633 S.E.2d at 754*; *Burchette v, Commonwealth, 15 Va. App. 432, 435, 425 S.E.2d 81, 83 (1992)*; *Gillis v. Commonwealth, 215 Va. 298, 301–02, 208 S.E.2d 768, 770–71 (1974).* However, ownership or occupancy of a vehicle or premises, standing alone, is not sufficient to establish possession. *Wilson v. Commonwealth, 272 Va. at 26–27, 630 S.E.2d at 330 (2006)*; *Garland v. Commonwealth, 225 Va. at 184, 300 S.E.2d at 784.*

Evidence was sufficient to prove that a passenger in a car had constructive possession of drugs where the drugs and a firearm with the passenger's DNA were found under the passenger's seat, and the passenger refused to open the glove compartment where other drugs were found. *McMillan, 277 Va. at 19–20, 671 S.E.2d at 400.* Constructive possession was established where the drugs, although not on the defendant's person, were in the area of his immediate control (in the glove compartment and under the driver's seat). *Adkins, 217 Va. at 438–39, 229 S.E.2d at 870.* See also *Ervin, 57 Va. App. at 503–521, 704 S.E.2d at 139–148.* Evidence of constructive possession was sufficient where marijuana was found growing near to the entrance to the house, the plants had recently been watered, and personal use paraphernalia was found under a couch. *Walton, 255 Va. at 426, 497 S.E.2d at 871–72.* Constructive possession was also proven when drugs were found in a suitcase at an airport that also contained a firearm with defendant's fingerprint, and contained clothes similar to the clothes of the defendant. *Andrews, 216 Va. at 181–83, 217 S.E.2d at 814.*

Possession of drugs need not be exclusive; it may be shared with other persons. *Archer v. Commonwealth, 225 Va. 416, 418, 303 S.E.2d 863, 863–64 (1983)*; *Castaneda v. Commonwealth, 7 Va. App. 574, 584, 376 S.E.2d 82, 87 (1989).*

Where the Commonwealth relies on circumstantial evidence, the evidence must be an unbroken chain of circumstances proving the guilt of the accused to the exclusion of any other reasonable hypothesis. *McMillan, 277 Va. at 19, 671 S.E.2d at 400*; *Gordon, 212 Va. at 300–01, 183 S.E.2d at 737.*

Only a modicum or trace amount of drugs is necessary in order to have possession of illegal drugs. *Stanley v. Commonwealth, 12 Va. App. 867, 869–72, 407 S.E.2d 13, 17 (1991)*; *Robbs v. Commonwealth, 211 Va. 153, 154–55, 176 S.E.2d 429, 430 (1970).*

Possession of a controlled substance is a lesser-included offense of distribution. *Austin, 33 Va. App. at 129, 531 S.E.2d at 639.*

The Practice Commentary to Instruction No. 22.350 contains a discussion of the factors to be considered in determining whether the possession is with intent to

distribute.

In most cases, Instruction No. 2.400, Circumstantial Evidence, should be given with this instruction.

ALERTS:

The General Assembly has repealed Va. Code Ann. § 18.2-250.1 as of July 1, 2021. Effective on that date and thereafter, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. Possession on one's "person or in any public place" of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both. *Id.* This offense is addressed by Instruction No. 22.521.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.340

Controlled Substance—Knowledge of Character

Knowledge that the substance [manufactured; distributed; possessed] **is** [marijuana; name of controlled substance; a controlled substance] **is an element of the crime of** [manufacturing; distributing; possessing; possessing with intent to distribute; possessing with intent to manufacture]. **Thus, you may not find the defendant guilty of such crime unless you believe beyond a reasonable doubt that he was aware that the substance he** [manufactured; distributed; possessed] **was** [marijuana; name of controlled substance; a controlled substance].

SOURCES & AUTHORITY

GOVERNING STATUTES:

None.

CASE AUTHORITY:

Yerling v. Commonwealth, 71 Va. App. 527, 534–35, 838 S.E.2d 66, 69–70 (2020); *Christian v. Commonwealth, 59 Va. App. 603, 608–14, 721 S.E.2d 809, 811–15 (2012)*; *Young v. Commonwealth, 275 Va. 587, 590–92, 659 S.E.2d 308, 310–11 (2008)*; *Ward v. Commonwealth, 47 Va. App. 733, 751–53, 627 S.E.2d 520, 529–30 (2006)*; *Wilson v. Commonwealth, 46 Va. App. 408, 432–37, 617 S.E.2d 431, 443–45 (2005)*; *Anderson v. Commonwealth, 19 Va. App. 64, 67–68, 448 S.E.2d 888, 890–91 (1994)*; *Brown v. Commonwealth, 15 Va. App. 1, 7–10, 421 S.E.2d 877, 881–83 (1992)*; *Fogg v. Commonwealth, 216 Va. 394, 395, 219 S.E.2d 672, 673 (1975)*.

PRACTICE COMMENTARY: Actual or constructive possession of the controlled substance alone is not sufficient for a conviction. *Young, 275 Va. at 591, 659 S.E.2d at 310*; *Burton v. Commonwealth, 215 Va. 711, 713, 213 S.E.2d 757, 759 (1975)*. Knowledge is an essential element of the crimes of manufacturing, distributing, possessing, possessing with the intent to distribute, or possessing with intent to manufacture marijuana or controlled substances. The Commonwealth must prove beyond a reasonable doubt that the possession of the substance is knowing and intentional. *Young, 275 Va. at 591, 659 S.E.2d at 310*; *Buono v. Commonwealth, 313 Va. 475, 476, 193 S.E.2d 798, 798–99 (1975)*.

In a possession or possession with intent to distribute case, the elements in this instruction are also covered in Instruction No. 22.330 (defining possession). If Instruction No. 22.330 is given, it is probably not necessary to give this instruction.

ALERTS:

• In possession cases where a defendant's knowledge of the precise identity of a controlled substance is an issue, the Commonwealth need only prove that a defendant knew he possessed a controlled substance. Accordingly, the "controlled substance" option within the brackets should be used instead of naming a particular drug. *Sierra v. Commonwealth, 59 Va. App. 770, 722 S.E.2d 656 (2012)*.

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the

Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.350

Intent to Distribute—Factors to Be Considered in Determining

To possess with intent to distribute requires that the defendant have intent to distribute at the time of possession. In determining whether there is possession with intent to distribute, you may consider all facts and circumstances, including but not limited to: [the quantity possessed; the manner of packaging; the presence of an unusual amount of cash; the denomination of the cash possessed; the presence of equipment related to drug distribution; the presence or absence of drug paraphernalia suggestive of personal use; the presence of a firearm; the presence of a pager or electronic communications device; the conduct and statements of the defendant; the location at which the drugs were possessed; use of the drug by persons other than the defendant at the time it was seized; and the possession of more than one type of drug.]

[Where the defendant possesses a small quantity of drugs you may infer that the defendant intends to possess the drugs for personal use. However possession of a small quantity of drugs, combined with other facts and circumstances, may be sufficient to establish intent to distribute.]

Sources & Authority

Governing Statutes:

None.

Principal Case Authority:

Williams v. Commonwealth, 278 Va. 190, 194, 677 S.E.2d 280, 282 (2009); Christian v. Commonwealth, 33 Va. App. 704, 716, 536 S.E.2d 477, 483 (2000); Welshman v. Commonwealth, 28 Va. App. 20, 37, 502 S.E.2d 122, 130 (1998).

Other Relevant Decisions:

Gregory v. Commonwealth, 64 Va. App. 87, 99–101, 764 S.E.2d 732, 738–39 (2014); *Burrell v. Commonwealth, 58 Va. App. 417, 433–35, 710 S.E.2d 509, 517–18 (2011)*; *Holloway v. Commonwealth, 57 Va. App. 658, 667–668, 705 S.E.2d 510, 514 (2011)*; *Wright v. Commonwealth, 278 Va. 754, 760, 685 S.E.2d 655, 657–58 (2009)*; *Cooper v. Commonwealth, 54 Va. App. 558, 574–75, 680 S.E.2d 361, 369 (2009)*; *Scott v. Commonwealth, 55 Va. App. 166, 173–74, 684 S.E.2d 833, 837–38 (2009)*; *Askew v. Commonwealth, 40 Va. App. 104, 110–11, 578 S.E.2d 58, 60–62 (2003)*; *Kidd v. Commonwealth, 38 Va. App. 433, 448–49, 565 S.E.2d 337, 344–45 (2002); McCain v. Commonwealth, 261 Va. 483, 493, 545 S.E.2d 541, 547 (2001); Shackleford v. Commonwealth, 32 Va. App. 307, 325–28, 528 S.E.2d 123, 132–33 (2000); Clarke v. Commonwealth, 32 Va. App. 286, 304–05, 527 S.E.2d 484, 493 (2000); Gregory v. Commonwealth, 22 Va. App. 100, 110–111, 468 S.E.2d 117, 122 (1996)*; *Dutton v. Commonwealth, 220 Va. 762, 764–65, 263 S.E.2d 52, 54 (1980)*; *Adkins v. Commonwealth, 217 Va. 437, 439–40, 229 S.E.2d 869, 871 (1976)*; *Hunter v. Commonwealth, 213 Va. 569, 570–71, 193 S.E.2d 779, 780 (1973)*. See also the cases cited in the Case Authority and Practice Commentary following Instruction Nos. 22.300 and 22.330.

Practice Commentary: This first paragraph of this instruction contains the different facts and circumstances that may be considered on the issue of intent to distribute. It may be necessary to delete the facts and circumstances that are not involved in a particular case.

The second paragraph of this instruction should only be included when the defendant possesses a small quantity of drugs.

Instruction No. 2.400, defining circumstantial evidence, should be given with this instruction.

Because of the difficulty of proving intent directly, intent to distribute normally must be proven by circumstantial evidence. *Williams, 278 Va. at 194, 677 S.E.2d at 282*; *Craddock v. Commonwealth, 40 Va. App. 539, 553, 580 S.E.2d 454, 461 (2003)*; *Christian, 33 Va. App. at 716, 536 S.E.2d at 483*; *Welshman, 28 Va. App. at 37, 502 S.E.2d at 130*. Proof of guilt requires that a defendant possess the controlled substance contemporaneously with his intention to distribute the

substance. *Harper v. Commonwealth, 49 Va. App. 517, 521, 642 S.E.2d 779, 781 (2007)*; *Craddock, 40 Va. App. at 553, 580 S.E.2d at 461.*

Quantity of Drugs:

By amendment effective July 1, 2020, Va. Code Ann. § 18.2-248.1 provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use. Va. Code Ann. § 4.1-1100, effective July 1, 2021, provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product.

Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Va. Code Ann. § 4.1-1101(D). Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

Va. Code Ann. § 4.1-1101.1, effective July 1, 2021, provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

If the quantity of drugs possessed is greater than that ordinarily possessed for personal use, that fact alone may be sufficient to prove intent to distribute. *Williams v. Commonwealth, 42 Va. App. 723, 736–37, 594 S.E.2d 305, 312 (2004)*; *Iglesias v. Commonwealth, 7 Va. App. 93, 110, 372 S.E.2d 170, 180 (1988)*; *Dukes v. Commonwealth, 227 Va. 119, 122, 313 S.E.2d 382, 383 (1984)*; *Dutton, 220 Va. at 765, 263 S.E.2d at 54*; *Hunter, 213 Va. at 570, 193 S.E.2d at 780.*

Possession of a small quantity of drugs creates the inference that the drugs are for personal use. *Early v. Commonwealth, 10 Va. App. 219, 222, 391 S.E.2d 340, 341 (1990)*; *Servis v. Commonwealth, 6 Va. App. 507, 524, 371 S.E.2d 156, 164 (1988)*; *Monroe v. Commonwealth, 4 Va. App. 154, 156, 355 S.E.2d 336, 337 (1987)*; *Dukes, 227 Va. at 122, 313 S.E.2d at 383*; *Dutton, 220 Va. at 765, 263 S.E.2d at 54–55*. Possession of a small quantity of drugs combined with other facts and circumstances may, however, be sufficient to establish intent to distribute. *Servis, 6 Va. App. at 524, 371 S.E.2d at 164*; *Dutton, 220 Va. at 765, 263 S.E.2d at 54–55*; *Colbert, 219 Va. 1, 4, 244 S.E.2d 748, 749 (1978).*

Different facts and circumstances, in addition to quantity, may be considered on the issue of whether the defendant possessed drugs with the intent to distribute.

Burrell, 58 Va. App. at 434, 710 S.E.2d at 517–18; *Williams, 278 Va. at 194, 677 S.E.2d at 282*; *Scott, 55 Va. App. at 173, 684 S.E.2d at 837*; *Askew, 40 Va. App. at 110, 587 S.E.2d at 61*; *McCain, 261 Va. at 493, 545 S.E.2d at 547*; *Emerson v. Commonwealth, 43 Va. App. 263, 278, 597 S.E.2d 242, 250 (2004)*. Set forth below are different facts and circumstances in addition to quantity of drugs that may be considered on the issue of intent to distribute.

Firearms and Pagers:

Firearms and pagers are recognized as tools of the drug trade and are probative of intent to distribute. *Wright, 278 Va. at 760, 685 S.E.2d at 657*; *Cooper, 54 Va. App. at 574–75, 680 S.E.2d at 369*; *Scott, 55 Va. App. at 173, 684 S.E.2d at 837*; *Emerson, 43 Va. App. at 278, 597 S.E.2d at 250*; *Askew, 40 Va. App. at 110, 587 S. E.2d at 61*; *Christian, 33 Va. App. at 716, 536 S.E.2d at 483*; *Glasco v. Commonwealth, 26 Va. App. 763, 775, 497 S.E.2d 150, 156 (1998)*.

Packaging:

The manner of packaging of drugs can be probative of intent to distribute. *Wright, 278 Va. at 760, 685 S.E.2d at 657–58*; *Scott, 55 Va. App. at 173, 684 S.E.2d at 837*; *Williams, 278 Va. at 194, 677 S.E.2d at 282*; *McCain, 261 Va. at 493, 545 S.E.2d at 547*; *Emerson, 43 Va. App. at 278, 597 S.E.2d at 250*; *Servis, 6 Va. App. at 524, 371 S.E.2d at 164–65*; *Dukes, 227 Va. at 122–23, 313 S.E.2d at 384*.

Equipment Related to Drug Distribution:

The presence of equipment related to drug distribution may be probative evidence of intent to distribute drugs. *Wright, 278 Va. at 760, 685 S.E.2d at 657*; *Cooper, 54 Va. App. at 574–75, 680 S.E.2d at 369*; *Scott, 55 Va. App. at 173, 684 S.E.2d at 837*; *McCain, 261 Va. at 493, 684 S.E.2d at 547*; *Shears v. Commonwealth, 23 Va. App. 394, 402, 477 S.E.2d 309, 313 (1996)*; *Servis, 6 Va. App. at 524, 371 S.E.2d at 164–65*; *Hambury v. Commonwealth, 3 Va. App. 435, 438, 350 S.E.2d 524 (1986)*; *Eckhart v. Commonwealth, 222 Va. 447, 451, 281 S.E.2d 853, 855 (1981)*.

Amount and Denomination of Money:

The presence of an unusual amount of money in small denominations is a circumstance that negates the inference of possession for personal use. *McCain, 261 Va. at 493, 684 S.E.2d at 547*; *Emerson, 43 Va. App. at 278, 597 S.E.2d at 250*; *Welshman, 28 Va. App. at 37, 502 S.E.2d at 130*; *Servis, 6 Va. App. at 524, 371 S.E.2d at 165–65*; *Colbert v. Commonwealth, 219 Va. 1, 4, 244 S.E.2d 748, 749 (1978)*

Statements, Acts and Conduct By The Defendant:

Statements, acts and conduct by the defendant may be evidence of intent to distribute. *Harper v. Commonwealth, 49 Va. App. at 522, 642 S.E.2d at 781 (2007)*;

Welshman, 28 Va. App. at 37, 502 S.E.2d at 130; *Langston, v. Commonwealth, 28 Va. App. 276, 286–87, 504 S.E.2d 380, 385 (1998).*

Area Where Accused is Arrested:

The area where the accused is arrested may be a relevant factor in determining intent to distribute, particularly when considered with other evidence of illegal activity. *Craddock, 40 Va. App. at 554, 580 S.E.2d at 462*; *Kidd, 38 Va. App. at 448–49, 565 S.E.2d at 344–45*; *Brown v. Commonwealth, 15 Va. App. 232, 235, 421 S.E.2d 911, 912 (1992).* However, the mere presence of a defendant in an area known for trafficking drugs is not sufficient to infer that a defendant is engaged in illegal activity. *Smith v. Commonwealth, 217 Va. 336, 337, 228 S.E.2d 562, 562–63 (1976).* There must be other evidence of illegal activity in order for evidence of drug activity in the area to be admissible. *Brown, 15 Va. App. at 235, 421 S.E.2d at 912*; *Coe v. Commonwealth, 231 Va. 83, 88–89, 340 S.E.2d 820, 823–24 (1986).*

Simultaneous Possession of Multiple Drugs:

Simultaneous possession of different drugs can indicate intent to distribute. *Cooper, 54 Va. App. at 574 n.5, 680 S.E.2d at 369 n.5*; *Scott, 55 Va. App. at 174, 684 S.E.2d at 837*; *Williams, 52 Va. App. at 202, 662 S.E.2d at 631*; *Harper, 49 Va. App. at 522, 642 S.E.2d at 781.*

Absence of Personal Use Drug Paraphernalia:

The absence of drug paraphernalia suggestive of personal use is recognized as evidence of intent to distribute. *Wright, 278 Va. at 760, 685 S.E.2d at 657*; *Harper, 49 Va. App. at 522, 642 S.E.2d at 781*; *Cost, 49 Va. App. at 229, 638 S.E.2d at 720*; *Craddock, 40 Va. App at 554, 580 S.E.2d at 462*; *Kidd, 38 Va. App. at 448, 565 S.E.2d at 344*; *Langston, 28 Va. App. at 288, 504 S.E.2d at 385*; *Welshman, 28 Va. App. at 37, 502 S.E.2d at 130.*

Use of Drugs By Other Persons:

Use of drugs by other persons at the time the drugs are seized is a factor in determining intent to distribute. *Adkins, 217 Va. at 439–40, 229 S.E.2d at 871*; *Hunter, 213 Va. at 571, 229 S.E.2d at 780.*

Expert Testimony:

The fact finder may consider expert testimony (usually by a police officer) in determining whether drugs were possessed with intent to distribute. *Askew, 40 Va. App. at 109–10, 578 S.E.2d at 61.* Expert testimony is generally admissible on the whether the possession of drugs by the accused is inconsistent with personal use. *Burrell, 58 Va. App. at 434, 710 S.E.2d at 517*; *Askew, 40 Va. App. at 109–10, 578 S.E.2d at 61*; *Davis v. Commonwealth, 12 Va. App. 728, 733, 406 S.E.2d 922, 925 (1991).* However, expert testimony upon an ultimate issue of fact is not permissible. *Shackleford v. Commonwealth,32 Va. App. 307, 327, 528 S.E.2d 123, 133, aff'd, 262 Va. 196, 547 S.E.2d 899 (2000)*; *Llamera v. Commonwealth, 243 Va. 262, 264, 414 S.E.2d 597, 598 (1992)* (expert testified that the quantity of cocaine suggests the defendant was a person who sold cocaine); *Gregory, 64 Va. App. at 99–100,*

764 S.E.2d at 738–39.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.360

Schedule I or II Controlled Substance—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

The defendant is charged with the crime of possession with intent to distribute (name of drug) **which is a Schedule** [I; II] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed with intent to distribute** (name of drug)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty of possession with intent to distribute (name of drug) [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

[If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant possessed (name of drug) but you do not find beyond a reasonable doubt that the defendant intended to distribute (name of drug), then you shall find the defendant guilty of possession of (name of drug) (but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you)].

[If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above offenses, then you shall find the defendant not guilty].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed with intent to distribute (name of drug), then you shall find the defendant not guilty.

Note:

When the jury may find from the evidence that the defendant possessed the controlled substance but did not intend to distribute or manufacture it, the bracketed paragraphs should be included in the instruction and the last paragraph should be deleted.

Instruction No. P22.360

Schedule I or II Controlled Substance—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

You have found the defendant guilty of the crime of possessing with intent to distribute (name of drug) **which is a Schedule** [I; II] **controlled substance.**

In determining the punishment, unless you find that the defendant possessed (name of drug) **with the intent to distribute only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug), **you shall fix his punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $500,000.**

If you have found beyond a reasonable doubt that the defendant possessed (name of drug) **with the intent to distribute, but further find from the greater weight of the evidence that this was done only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug), **then you shall fix his punishment at:**

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(A), (C), (D), 18.2-250, 54.1-3446, 54.1-3448.

CASE AUTHORITY:

See the Case Authority for Instruction Nos. 22.240 (Schedule I or II Controlled Substance—Selling, Giving, or Distributing: Evidence of Accommodation), 22.300 (Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give, or Distribute: No Evidence of Accommodation), 22.330 (Knowing and Intentional Possession—Definition), 22.350 (Intent to Distribute—Factors to Be Considered in Determining).

PRACTICE COMMENTARY: Knowing and intentional possession is defined in Instruction No. 22.330. See the cases cited in the Case Authority and the Practice Commentary for a discussion of the facts and circumstances that constitute possession. This instruction should also be given when possession of a Schedule I or II drug is an issue.

The factors to be considered in determining intent to distribute are set forth in Instruction No. 22.350. See the cases cited in the Case Authority and the Practice Commentary for a discussion of the factors to be considered in determining intent to distribute. This instruction should also be given if intent to distribute is an issue.

Only the word "distribute" is used throughout the instruction, since both "sell" and "give" are included within its meaning. "Manufacture" is not proper because the accommodation provision in Va. Code Ann. § 18.2-248(D) does not relate to manufacturing.

See Instruction No. 22.240 and accompanying Case Authority and Practice Commentary on accommodation.

ALERTS:

• See Instruction No. 22.600 relating to distribution of a controlled substance to a minor and Instruction No. 22.650 relating to offenses involving controlled substances on or near educational or recreational property.

• Possession with intent to distribute as an accommodation to another is a Class 5 felony.

• A defendant may receive an enhanced punishment for selling, giving, or distributing a Schedule I or II controlled substance upon a second conviction of such a violation. Va. Code Ann. § 18.2-248(C). The penalty for a second conviction is not less than 5 years (3 years of which shall be a mandatory minimum term of imprisonment to be served consecutively with any other sentence) nor more than life and a fine of not more than $500,000. In such event, the instruction should contain an additional element requiring the Commonwealth to prove that the offense is a second offense and the enhanced punishment provision should be substituted for the first offense punishment provision.

• A person convicted of a third or subsequent offense is subject to a sentence of

10 years to life imprisonment and a fine of up to $500,000, with 10 years of the sentence being a mandatory minimum term.

• In *Jones v. Commonwealth, 69 Va. App. 582, 589, 822 S.E.2d 19, 22 (2018)*, the Court of Appeals held that any prior conviction of an offense under Va. Code Ann. § 18.2-248, including a conviction as an accommodation under Va. Code Ann. § 18.2-248(D), triggers the enhanced-punishment provisions of Va. Code Ann. § 18.2-248(C).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

MICHIE'S JURISPRUDENCE. Drugs and Druggists. §§ 1, 2.

Instruction No. 22.370

Marijuana—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

The defendant is charged with the crime of possession with intent to distribute more than one-half [one] ounce but not more than five (5) pounds of marijuana. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed more than one-half [one] ounce but not more than five (5) pounds of marijuana with intent to distribute.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant possessed more than one-half [one] ounce but not more than five (5) pounds of marijuana with intent to distribute, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant distributed marijuana, then you shall find the defendant not guilty.

Instruction No. P22.370

Marijuana—Possession With Intent to Sell, Give, or Distribute: Evidence of Accommodation

You have found the defendant guilty of the crime of possession with intent to distribute more than one-half [one] ounce but not more than five (5) pounds of marijuana.

In determining the punishment, unless you find that the defendant possessed marijuana with intent to distribute only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon marijuana, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

If you have found beyond a reasonable doubt that the defendant possessed marijuana with intent to distribute, but further find from the greater weight of the evidence that this was done only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon marijuana, then you shall fix his punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Note:

If the charge specifies an amount either one-half [one] ounce or less, or more than five (5) pounds, see the Alerts for this Instruction.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.1.

CASE AUTHORITY:

See the Case Authority for Instruction Nos. 22.300 and 22.320.

PRACTICE COMMENTARY: Weight of the marijuana is an essential element of the offense. Based on the current definition of marijuana in Va. Code Ann. § 54.1-3401, stalks are considered marijuana only if they are combined with other parts of plants of the genus Cannabis. Under those circumstances, it is proper to include them in determining total weight. *Brown v. Commonwealth, 56 Va. App. 8, 12–13, 690 S.E.2d 301, 303 (2010).*

The definition of knowing and intentional possession is contained in Instruction No. 22.330. The cases in the Case Authority and Practice Commentary contain a discussion of the facts and circumstances that constitute possession. That instruction should also be given if possession is an issue.

The definition of intent to distribute is contained in Instruction No. 22.350. The cases in the Case Authority and Practice Commentary contain a discussion of the facts and circumstances that constitute intent to distribute. That instruction should also be given if intent to distribute is an issue.

Va. Code Ann. § 18.2-248.1 uses "gave," "distributed," and "possessed with intent to give or distribute" in the accommodation provision. However, the broad definition of "distribute" in Va. Code Ann. § 54.1-3401 and *Wood v. Commonwealth, 214 Va. 97, 197 S.E.2d 200 (1973)* indicates that distribution includes gift and sale. The instruction and this Case Authority and Practice Commentary, therefore, use "distribute" and "distribution" to include both sale and gift.

In *Stillwell v. Commonwealth,* the Supreme Court of Virginia interpreted Va. Code Ann. § 18.2-248 to require initially a determination of guilt or innocence. If the verdict is guilty, then proper punishment must be determined, with the defendant having the burden of proving an accommodation distribution by a preponderance of the evidence to be entitled to the lesser penalty. *219 Va. 214, 222–23, 247 S.E.2d 360, 365 (1978).* The accommodation provision in Va. Code Ann. § 18.2-248.1 is almost identical to the accommodation provision of Va. Code Ann. § 18.2-248(D) construed in *Stillwell. Id. at 217, 247 S.E.2d at 362.*

An instruction on accommodation should not be given unless supported by evidence. *King v. Commonwealth, 219 Va. 171, 173–74, 247 S.E.2d 368, 370 (1978); Porter v. Commonwealth, 66 Va. App. 302, 308–09, 785 S.E.2d 224, 227–28 (2016).*

ALERTS:

• By amendment effective July 1, 2020, one-half ounce is increased to one ounce in both Va. Code Ann. § 18.2-248.1(a)(1) and (a)(2). The included bracketed word "one" is relevant to, and should be used for, alleged offenses occurring on or after

July 1, 2020. Additionally, Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• Va. Code Ann. § 4.1-1100, effective July 1, 2021, provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product.

• Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Va. Code Ann. § 4.1-1101(D). Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

• Va. Code Ann. § 4.1-1101.1, effective July 1, 2021, provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Graduated penalties for possession with intent to distribute marijuana have been established. Va. Code Ann. § 18.3-248.1. Possession with intent to distribute more than one-half [one] ounce but less than five pounds is a Class 5 felony, and this punishment provision is used in the instruction. A person convicted of a third or subsequent felony offense under Va. Code Ann. § 18.2-248.1 is subject to a sentence of five (5) years to life imprisonment and a fine of up to $500,000, with five (5) years of the sentence being a mandatory minimum term.

• If the amount of marijuana is less than one-half [one] ounce or more than five pounds, the amount specified in the charge should be substituted for "more than one-half [one] ounce but less than five pounds" in the first, second and third paragraphs. Possession with intent to distribute one-half [one] ounce or less is a Class 1 misdemeanor and only punishment provisions (2) through (4) in the instruction should be used in such cases. Possession with intent to distribute more than five pounds is a felony punishable by a specific term of imprisonment, but not less than five (5) years nor more than thirty (30) years, and this provision should be substituted for punishment provisions (1) through (4) of the model instruction.

• Generally, possession with intent to distribute as an accommodation is a Class 1 misdemeanor, but possession with intent to distribute as an accommodation to an inmate of a penal institution is a Class 4 felony. Va. Code Ann. § 18.2-248.1(b).

Possession of marijuana by a prisoner in a state, local or community correctional facility is a Class 5 felony. Va. Code Ann. § 53.1-203(6). See also Instruction No. 22.600 in connection with distribution of marijuana to a minor and Instruction No. 22.650 in connection with offenses involving marijuana on or near educational or recreational property; the penalty for these offenses is specified by statute and does not vary based on the amount of marijuana.

• For alleged offenses occurring before July 1, 2020, it is possible that the evidence could support a charge of possession as a lesser-included crime. If so, add an instruction on possession as addressed by the Alert following Instruction No. 22.120.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.400

Schedule III, IV or V Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute: No Evidence of Accommodation

The defendant is charged with the crime of [manufacturing; distributing; possessing with intent to (manufacture; distribute)] (name of drug) **which is a Schedule** [III; IV; V] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant** [manufactured; distributed; possessed with intent to (manufacture; distribute)] (name of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [manufactured; distributed; possessed with intent to (manufacture; distribute)] (name of drug)**, then you shall find the defendant not guilty.**

(manufacture; distribute) (name of drug), then you shall find the defendant not guilty.

Instruction No. P22.400

Schedule V Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute

You have found the defendant guilty of [manufacturing; distributing; possessing with intent to (manufacture; distribute)] (name of drug)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but for not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(F), 54.1-3454.

CASE AUTHORITY:

See cases cited in Case Authority and Practice Commentary following Instruction No. 22.300.

PRACTICE COMMENTARY: Knowing and intentional possession is defined in Instruction No. 22.330. See the cases cited in the Case Authority and the Practice Commentary for a discussion of the facts and circumstances that constitute possession. That instruction should be given when possession is an issue.

The definition of intent to distribute is contained in Instruction No. 22.350. The factors to consider in determining intent to distribute are set forth in Instruction No. 22.350. See the cases cited in the Case Authority and Practice Commentary for a discussion of the factors to be considered in determining intent to distribute. That instruction should also be given if intent to distribute is an issue.

Instruction 22.400 applies to the guilt phase for Schedule III, IV, and V. The appropriate punishment instruction will depend on whether the drug is a Schedule III, IV, or V, the nature of the charge and whether there is evidence of accommodation. A Schedule III drug is a Class 5 felony, a Schedule IV drug is a Class 6 felony, and a Schedule V drug is a Class 1 misdemeanor. See Instruction Nos. P22.420 (Schedule III, no accommodation); P22.430 (Schedule III, accommodation); P22.440 (Schedule IV, no accommodation); P22.450 (Schedule IV, accommodation). Accommodation is neither implicated for Schedule V drugs, nor for cases involving manufacture or possession with intent to manufacture a Schedule III or IV drug. See Va. Code Ann. § 18.2-248(E3).

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

- The guilt instruction should be modified to specify the appropriate schedule.
- See also Instruction No. 22.600 in connection with distribution of a controlled substance to a minor and Instruction No. 22.650 in connection with offenses involving controlled substances on or near educational or recreational property. The instruction does not apply to the distribution of anabolic steroids classified in Schedule III, which are punished under Va. Code Ann. § 18.2-248.5.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.410

Schedule III or IV Controlled Substance—Selling, Giving, Distributing or Possessing With the Intent to Distribute: Evidence of Accommodation

The defendant is charged with the crime of [distributing; possessing with intent to distribute] **(name of drug) which is a Schedule** [III; IV] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant** [distributed; possessed with intent to distribute] **(name of drug).**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [distributed; possessed with intent to distribute] **(name of drug), then you shall find the defendant not guilty.**

Instruction No. P22.420

Schedule III Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture or Distribute: No Evidence of Accommodation

You have found the defendant guilty of the crime of [manufacturing; distributing; possessing with intent to manufacture or distribute] (name of drug) **which is a Schedule III controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500 or and a fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(E), (E1), (E3), 54.1-3450.

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(E); (E1), (E3), 54.1-3450.

Instruction No. P22.430

Schedule III Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: Evidence of Accommodation

You have found the defendant guilty of the crime of [distributing; possessing with intent to distribute] (name of drug) **which is a Schedule III controlled substance.**

In determining the punishment, unless you find that the defendant [distributed; possessed with intent to distribute] (name of drug) **with the intent to distribute only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug)**, you shall fix the defendant's punishment at:**

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500

If you have found beyond a reasonable doubt that the defendant [distributed; possessed with intent to distribute] (name of drug) **but further find from the greater weight of the evidence that** [this distribution was done; the defendant intended to distribute] **only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug)**, then you shall fix his punishment at:**

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(E), (E1), (E3), 54.1-3450.

Instruction No. P22.440

Schedule IV Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: No Evidence of Accommodation

You have found the defendant guilty of the crime of [distributing; possessing with intent to distribute] (name of drug) **which is a Schedule IV controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.

After consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for not less than twenty (20) months and a fine of a specific amount, but not more than $2,500.

Instruction No. P22.450

Schedule IV Controlled Substance—Selling, Giving, Distributing, or Possessing With Intent to Distribute: Evidence of Accommodation

You have found the defendant guilty of the crime of [distributing; possessing with intent to distribute] (name of drug) **which is a Schedule IV controlled substance:**

In determining the punishment, unless you find that the defendant [distributed; possessed with intent to distribute] (name of drug) **with the intent to distribute only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug)**, you shall fix the defendant's punishment at:**

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.

If you have found beyond a reasonable doubt that the defendant [distributed; possessed with intent to distribute] (name of drug) **but further find from the greater weight of the evidence that** [this distribution was done; the defendant intended to distribute] **only as an accommodation to another and not with the intent to profit or to induce the recipient to use or become addicted to or dependent upon** (name of drug)**, then you shall fix his punishment at:**

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.

Instruction No. 22.500(a)

Schedule I, II, or III Controlled Substance—Possession

The defendant is charged with crime of possessing (name of drug) which is a Schedule [I; II; III] **controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly and intentionally possessed** (name of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed (name of drug), **then you shall find the defendant not guilty.**

Instruction No. 22.500(b)

Possession of a Schedule IV Controlled Substance

The defendant is charged with the crime of possession of (name of drug) **which is a Schedule IV controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed** (name of drug)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

[You have found the defendant guilty of the crime of possession of (name of drug) which is a Schedule IV controlled substance. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

1. **Confinement in jail for a specific time but not more than six (6) months; or**
2. **A fine of a specific amount, but not more than $1,000; or**
3. **Confinement in jail for a specific time, but not more than six (6) months, and a fine of a specific amount, but not more than $1,000].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed (name of drug)**, then you shall find the defendant not guilty.**

Instruction No. 22.500(c)

Possession of a Schedule V Controlled Substance

The defendant is charged with the crime of possession of (name of drug) **which is a Schedule V controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed** (name of drug)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

[You have found the defendant guilty of the crime of possession of (name of drug) which is a Schedule V controlled substance. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of a specific amount, but not more than $500.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed (name of drug)**, then you shall find the defendant not guilty.**

[You have found the defendant guilty of the crime of possession of (name of drug) [which is a Controlled Substance]. [Specification (1) alleges the circumstance you have heard. You shall fix the defendant's punishment at a fine of a specific amount, not more than $500.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [name of drug], then you shall find the defendant not guilty.

Instruction No. 22.500(d)

Possession of a Schedule VI Controlled Substance

The defendant is charged with the crime of possession of (name of drug) **which is a Schedule VI controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed** (name of drug)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

[You have found the defendant guilty of the crime of possession of (name of drug) which is a Schedule VI controlled substance. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of a specific amount, but not more than $250.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed (name of drug)**, then you shall find the defendant not guilty.**

Instruction No. P22.500(a)

Schedule I or II Controlled Substance—Possession

You have found the defendant guilty of the crime of possessing (name of drug) **which is a Schedule** [I; II] **controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(1) A specific term of imprisonment, but not more than one (1) year;

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P22.500(b)

Schedule I Controlled Substance—Cannabimimetic Agents—Possession

You have found the defendant guilty of the crime of possessing (name of drug) **which is a cannabimimetic agent.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) **Confinement in jail for a specific time, but not more than twelve (12) months; or**

(2) **A fine of a specific amount, but not more than $2,500; or**

(3) **Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.**

Instruction No. P22.500(c)

Schedule III Controlled Substance—Possession

You have found the defendant guilty of the crime of possessing (name of drug) **which is a Schedule III controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-250, 54.1-3450.

CASE AUTHORITY:

Sierra v. Commonwealth, 59 Va. App. 770, 777, 722 S.E.2d 656, 659 (2012); Cordon v. Commonwealth, 280 Va. 691, 696, 701 S.E.2d 803, 806 (2010); Ward v. Commonwealth, 47 Va. App. 733, 751–53, 627 S.E.2d 520, 529–30 (2006); Wilson v. Commonwealth, 46 Va. App. 408, 432–37, 617 S.E.2d 431, 443–45 (2005); Austin v. Commonwealth, 33 Va. App. 124, 126–30, 531 S.E.2d 637, 638–39 (2000); Shackleford v. Commonwealth, 32 Va. App. 307, 325–28, 528 S.E.2d 123, 132–33 (2000). See also Case Authority and Practice Commentary following Instruction No. 22.330.

PRACTICE COMMENTARY: See Instruction No. 22.330 and accompanying Case Authority and Practice Commentary for definition and discussion of possession. See Instruction No. 18.610 dealing with the crime of possessing a firearm while possessing certain controlled substances.

Possession of a Schedule III substance by a prisoner in a state, local or community correctional facility is a Class 5 felony. Va. Code Ann. § 53.1-203(6).

Possession of a controlled substance is a lesser-included offense of distribution. *Austin, 33 Va. App. at 129, 531 S.E.2d at 639.*

The Court of Appeals of Virginia has held that a defendant need know only that he is possessing a controlled substance to be guilty of violating Va. Code Ann. § 18.2-250, and need not know the particular controlled substance of which he is in possession. *Sierra, 59 Va. App. at 782–83, 722 S.E.2d at 662.*

ALERTS:

• See Va. Code Ann. § 54.1-3456 dealing with designer drugs that emulate or simulate the effects of Schedule I or Schedule II controlled substances.

• Any person who violates Va. Code Ann. § 18.2-250 with respect to any controlled substance classified in Schedule I or II shall be guilty of a Class 5 felony, except that any person other than an inmate of a penal institution or in the custody of an employee thereof who violates this section with respect to a cannabimimetic agent is guilty of a Class 1 misdemeanor. Va. Code Ann. § 18.2-250(a). Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

• If possession was obtained directly from, or pursuant to, a valid prescription or order of a practitioner in the course of his practice or if possession was authorized under the Drug Control Act, then possession is lawful. The presence of either exception is an affirmative defense, for which the defendant has the burden of going forward with supporting evidence. *Williams v. Commonwealth, 57 Va. App. 341, 352, 702 S.E.2d 260, 265 (2010).* If there is evidence of such authorized possession in a specific case, then an appropriate instruction should be given and

the above instruction would have to be amended to cover the point.

• See also Va. Code Ann. § 18.2-263, which provides that the Commonwealth need not negate any exception, excuse, proviso or exemption, and that the burden of proof of such is on the defendant.

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

• Cannabimimetic Agents (formerly Synthetic Cannabinoids)—Former Va. Code Ann. § 18.2-248.1:1 defined "synthetic cannabinoids" and established penalties for their possession, distribution, possession with intent to distribute, and manufacture. That statute was repealed effective July 1, 2014. For offenses occurring on and after that date, the term "cannabimimetic agents" was substituted for the term "synthetic cannabinoids," and "cannabimimetic agents" are now placed on the list of controlled substances in Schedule I, Va. Code Ann. § 54.1-3446(6), where they are subject to the same penalties as those for other Schedule I controlled substances with the exception of simple possession, which is penalized as a Class 1 misdemeanor instead of a Class 5 felony. Va. Code Ann. § 18.2-250. Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

the above instruction would have to be amended to read as [illegible]:

• See also Va. Code Ann. § 18.2-[illegible], which provide[illegible] that [illegible]
[illegible]

Instruction No. 22.520

Marijuana—Possession

The defendant is charged with the crime of possessing marijuana. The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly and intentionally possessed marijuana.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

[You shall fix his punishment at:

(1) Confinement in jail for a specific time, but not more than thirty (30) days; or

(2) A fine of a specific amount, but not more than $500; or

(3) Confinement in jail for a specific time, but not more than thirty (30) days, and a fine of a specific amount, but not more than $500.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed marijuana, then you shall find the defendant not guilty.

Note:

This instruction applies only for offenses occurring prior to July 1, 2020. Effective July 1, 2020, simple marijuana possession was no longer a state crime. On and after that date, any person who violated Va. Code Ann. § 18.2-250.1 is subject to a civil penalty of no more than $25.00.

When the defendant committed the crime of possession of marijuana, second or subsequent offense prior to July 1, 2020, substitute the following for the second paragraph and the punishment provision:

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly and intentionally possessed marijuana as charged and you further find from the evidence that the defendant has previously been convicted of possession of marijuana, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

Instruction No. P22.520

Possession of Marijuana—Second or Subsequent Offense

You have found the defendant guilty of the crime of possession of marijuana, second or subsequent offense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

1. **Confinement in jail for a specific time, but not more than twelve (12) months; or**
2. **A fine of a specific amount, but not more than $2,500; or**
3. **Confinement in jail for a specific time, but not more than twelve (12) months, and fine of a specific amount, but not more than $2,500.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-250.1, 18.2-251.1.

CASE AUTHORITY:

Murphy v. Commonwealth, 31 Va. App. 70, 75, 521 S.E.2d 301, 303 (1999). See also the Case Authority and Practice Commentary following Instruction No. 22.330.

PRACTICE COMMENTARY: When possession is an issue, Instruction No. 22.330 should also be given.

Possession of marijuana by a prisoner in a state, local or community correctional facility is a Class 5 felony. Va. Code Ann. § 53.1-203(6).

ALERTS:

• Effective July 1, 2020, simple marijuana possession under Va. Code Ann. § 18.2-250.1 is no longer a state crime. On and after that date, until July 1, 2021, any person who violates Va. Code Ann. § 18.2-250.1 is subject to a civil penalty of no more than $25.00.

Effective July 1, 2021, Va. Code Ann. § 18.2-250.1 is repealed, and pursuant to Va. Code Ann. § 4.1-1100, a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. *Id.* Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both. *Id.* Instruction No. 22-521 covers this new offense.

As a result of the above, the substance of any related jury instruction(s) may be dependent on the date of the alleged offense.

• Va. Code Ann. § 18.2-248.1, by amendment effective July 1, 2020, provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• If possession was obtained directly from, or pursuant to a valid prescription or order of a practitioner in the course of his practice or if possession was authorized under the Drug Control Act, then possession is lawful. If such possession is alleged in a specific case, then an appropriate instruction should be given and the above instruction would have to be amended to cover the point. There is, however, no defense of necessity. *Murphy, 31 Va. App. at 75, 521 S.E.2d at 303.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.520(a)

Marijuana—Possession; Presumption of Personal Use

It is presumed that a person who possesses no more than one ounce of marijuana possesses it for personal use. Other evidence may rebut this presumption.

***ALERT*:**

This instruction should only be given for alleged offenses occurring on or after July 1, 2020 and before July 1, 2021. Va. Code Ann. § 18.2-248.1. Pursuant to Va. Code Ann. § 4.1-1100, effective July 1, 2021, a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. *Id.* Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both. *Id.* Instruction No. 22-521 covers this new offense.

As a result of the above, the substance of any related jury instruction(s) may be dependent on the date of the alleged offense.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-248.1.

PRACTICE COMMENTARY: The decision in *Yap v. Commonwealth, 49 Va. App. 622, 633, 643 S.E.2d 523, 528 (2007)*, requires that the phrase "rebuttable presumption" be construed to mean "permissible inference" in cases where the presumption is against the defendant. *Yap*, however, does not require such a construction when the rebuttable presumption is in favor of the defendant. Accordingly, the use of the term "rebuttable presumption" is retained in this instruction.

Instruction No. 22.521

Marijuana or Marijuana Products—Possession

The defendant is charged with the crime of possessing on his person [or in a public place] **more than one pound of marijuana or an equivalent amount of marijuana products. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed on his person** [or in a public place] **more than one pound of marijuana or an equivalent amount of marijuana products.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed on his person [or in a public place] **more than one pound of marijuana or an equivalent amount of marijuana product, then you shall find the defendant not guilty.**

***ALERTS*:**

• Effective July 1, 2021, Va. Code Ann. § 18.2-250.1 is repealed, and pursuant to Va. Code Ann. § 4.1-1100, a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product. Possession of more than one ounce, but not more than one pound, of marijuana or an equivalent amount of marijuana product is no longer a crime, and is subject to a civil penalty of not more than $25.00. *Id.* Possession on one's person or in any public place of more than one pound of marijuana or an equivalent amount of marijuana product is a felony punishable by imprisonment or a fine, or both. *Id.* Instruction No. 22-521 covers this new offense.

• Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence. Civil penalties and punishments for conviction of the possession of more than four plants vary in severity based on the number of plants in a person's possession. Va. Code Ann. § 4.1-1101(D). Instruction Nos. 22.522(a) through P22.523(b) address these offenses.

Practice Commentary: Va. Code Ann. § 4.1-600 of the Cannabis Control Act provides the following definitions:

a. "Marijuana" means any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, its resin, or any extract containing one or more cannabinoids. "Marijuana" does not include the mature stalks of such plant, fiber produced from such stalk, or oil or cake made from the seed of such plant, unless such stalks, fiber, oil, or cake is combined with other parts of plants of the genus Cannabis; and

b. "Marijuana products" means (i) products that are composed of marijuana and other ingredients and are intended for use or consumption, ointments, and tinctures, or (ii) marijuana concentrate.

c. "Public place" means any place, building, or conveyance to which the public has, or is permitted to have, access, including restaurants, soda fountains, hotel dining areas, lobbies and corridors of hotels, and any park, place of public resort or amusement, highway, street, lane, or sidewalk adjoining any highway, street, or lane.

Instruction No. P22.521

Marijuana or Marijuana Products—Possession

You have found the defendant guilty of the crime of possession of marijuana or marijuana products.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than ten (10) years; or

(2) A fine of a specific amount, but not more than $250,000; or

(3) Confinement in prison for not less than one (1) year nor more than ten (10) years, and a fine of a specific amount, but not more than $250,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1100.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.522(a)

Marijuana Plants for Personal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants

The defendant is charged with the crime of possession of more than ten (10) and no more than forty-nine (49) marijuana plants cultivated at his place of residence for defendant's personal use. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed more than 10 but no more than 49 marijuana plants cultivated at his place of residence for defendant's personal use.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed more than 10 but no more than 49 marijuana plants cultivated at his place of residence for defendant's personal use, then you shall find the defendant not guilty.

Marijuana Plants for Personal Use—Home Cultivation not More Than Ten and Not More Than 25 Plants

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant possessed more than 10 but no more than 25 marijuana plants cultivated in his place of residence for defendant's personal use,

Instruction No. P22.522(a)

Marijuana Plants for Personal Use—Home Cultivation of More Than 10 and Not More Than 49 Plants

You have found the defendant guilty of the crime of possession of more than ten (10) but not more than forty-nine (49) marijuana plants cultivated at his place of residence for defendant's personal use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but for not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500.00; or

(3) Confinement in jail for not more than one (1) year and a fine of a specific amount, but not more than $2,500.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1101.

Practice Commentary: A person 21 years of age or older may cultivate at their main place of residence up to four marijuana plants for personal use. Va. Code Ann. § 4.1-1101(A). Cultivation of more than four but not more than ten plants is subject to a civil penalty of $250 for the first offense, but criminal penalties for subsequent offenses. See Instruction No. 22-525.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.522(b)

Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants

The defendant is charged with the crime of possession of more than forty-nine (49) but not more than one hundred (100) marijuana plants cultivated at his place of residence for defendant's personal use. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed more than 49 but not more than 100 marijuana plants cultivated at his place of residence for defendant's personal use.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed more than 49 but not more than 100 marijuana plants cultivated at his place of residence for defendant's personal use, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed more than 40 but not more than 100 pounds of marijuana, you shall find the defendant not guilty.

Instruction No. P22.522(b)

Marijuana Plants for Personal Use—Home Cultivation of More Than 49 and Not More Than 100 Plants

You have found the defendant guilty of the crime of possession of more than forty-nine (49) but not more than one hundred (100) marijuana plants cultivated at his place of residence for defendant's personal use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but for not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500.00; or

(4) Confinement in jail for not more than twelve (12) months and a fine of a specific amount, but not more than $2,500.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1101.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.522(c)

Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants

The defendant is charged with the crime of possession of more than one hundred (100) marijuana plants cultivated at his place of residence for defendant's personal use. The Commonwealth must prove beyond a reasonable doubt that the defendant possessed more than 100 marijuana plants cultivated at his place of residence for defendant's personal use.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant possessed more than 100 marijuana plants cultivated at his place of residence for defendant's personal use, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt [illegible] Count [illegible] of the Indictment guilty,

If you find that the Commonwealth has failed to prove beyond a reasonable doubt [illegible] of the Indictment guilty, you shall find the defendant not guilty.

Instruction No. P22.522(c)

Marijuana Plants for Personal Use—Home Cultivation of More Than 100 Plants

You have found the defendant guilty of the crime of possession of more than one hundred (100) marijuana plants cultivated at his place of residence for defendant's personal use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in prison for a specific time, but not less than one (1) year nor more than ten (10) years; or

(2) A fine of a specific amount, but not more than $250,000; or

(3) Confinement in prison for not less than one (1) year nor more than ten (10) years and a fine of a specific amount, but not more than $250,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1101.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.523

Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations

The defendant is charged with the crime of possession of more than four (4) but not more than ten (10) marijuana plants cultivated at his place of residence for defendant's personal use third [or subsequent] **offense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant possessed more than 4 but not more than 10 marijuana plants cultivated at his place of residence for defendant's personal use; and

(2) That the defendant has committed two [or more] **prior offenses for this crime.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element but has failed to prove the second element of the crime as charged, then you shall find the defendant guilty of possession of more than four (4) but not more than ten (10) marijuana plants cultivated at his place of residence for defendant's personal use [first or second] **offense.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the crime, then you shall find the defendant not guilty.

(1) That the defendant possessed more than 4 but not more than 10 marijuana plants cultivated at his place of residence for defendant's personal use; and

(2) That the defendant has committed two [or more] prior offenses for this crime.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the elements of this crime, you shall find the defendant guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element but failed to prove the second element of the crime as charged, then you shall find the defendant guilty of possession of more than four (4) but not more than ten (10) marijuana plants cultivated at his place of residence for defendant's personal use [first or second] offense.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the crime, then you shall find the defendant not guilty.

Instruction No. P22.523(a)

Marijuana Plants for Personal Use—Home Cultivation—Multiple Violations

You have found the defendant guilty of possession of more than four (4) but not more than ten (10) marijuana plants cultivated at his place of residence for defendant's personal use third [or subsequent] **offense.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but for not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000.00; or

(3) Confinement in jail for not more than six (6) months and a fine of a specific amount, but not more than $1,000.00.

Instruction No. P22.523(b)

Marijuana Plants for Personal Use—Home Cultivation—Second Offense

You have found the defendant guilty of possession of more than four (4) but not more than ten (10) marijuana plants cultivated at his place of residence for defendant's personal use second offense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of a specific amount, but not more than $500.00.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 4.1-1101.

Practice Commentary: Va. Code Ann. § 4.1-1101(D) provides that the penalty for the first conviction of this offense is a civil penalty of $250.00.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.524

Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities

The defendant is charged with the crime of [possessing or consuming] **marijuana or marijuana products in or upon the grounds of a public elementary or secondary school during school hours or school or student activities. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [possessed or consumed] **marijuana or marijuana products in or upon the grounds of a public elementary or secondary school; and**

(2) **That such** [possession or consumption] **occurred during school hours or school or student activities.**

If you find from the evidence that the Commonwealth has proved each of the elements of the crime beyond a reasonable doubt, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P22.524

Possessing or Consuming Marijuana or Marijuana Products—Public School Grounds During School Hours or School or Student Activities

You have found the defendant guilty of the crime of [possessing or consuming] **marijuana or marijuana products in or upon the grounds of a public elementary or secondary school during school hours or school or student activities.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000.00; or

(3) Confinement in jail for not more than six (6) months and a fine of a specific amount, but not more than $1,000.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1109.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Va. Code Ann. § 4.1-1109 does not define what constitutes "school hours."

Va. Code Ann. § 4.1-1109 does not include private schools within its scope.

Instruction No. 22.525

Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities

The defendant is charged with the crime of consuming marijuana or marijuana products in or upon the grounds of a public elementary or secondary school after school hours or school or student activities. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant consumed marijuana or marijuana products in or upon the grounds of a public elementary or secondary school; and

(2) That such consumption occurred after school hours or school or student activities.

If you find from the evidence that the Commonwealth has proved each of the elements of the crime beyond a reasonable doubt, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved each of the elements of the crime beyond a reasonable doubt, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt [illegible]

Instruction No. P22.525

Consuming Marijuana or Marijuana Products—Public School Grounds After School Hours or School or Student Activities

You have found the defendant guilty of the crime of consuming marijuana or marijuana products in or upon the grounds of a public elementary or secondary school after school hours or school or student activities.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000.00; or

(3) Confinement in jail for not more than six (6) months and a fine of a specific amount, but not more than $1,000.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1109.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Va. Code Ann. § 4.1-1109 does not define what constitutes "school hours."

Va. Code Ann. § 4.1-1109 does not include private schools within its scope.

Instruction No. 22.526

Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway

The defendant is charged with the crime of [using or consuming] **marijuana or marijuana products while driving a motor vehicle upon a public highway in the Commonwealth** [or while being a passenger in a motor vehicle being driven upon a public highway of the Commonwealth]. **The Commonwealth must prove beyond a reasonable doubt that the defendant** [used or consumed] **marijuana or marijuana products while driving a motor vehicle upon a public highway in the Commonwealth** [or while being a passenger in a motor vehicle being driven upon a public highway of the Commonwealth].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [used or consumed] **marijuana or marijuana products while driving a motor vehicle upon a public highway in the Commonwealth** [or while being a passenger in a motor vehicle being driven upon a public highway of the Commonwealth]**, then you shall find the defendant not guilty.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [read or paraphrase specific charge] while driving a motor vehicle upon a public highway in the Commonwealth [or while being a passenger in a motor vehicle being driven upon a public highway in the Commonwealth], then you shall find the defendant not guilty.

Instruction No. P22.526

Using or Consuming Marijuana or Marijuana Products While in a Motor Vehicle Being Driven on a Public Highway

You have found the defendant guilty of the crime of [using or consuming] **marijuana or marijuana products while driving a motor vehicle upon a public highway in the Commonwealth** [or while being a passenger in a motor vehicle being driven upon a public highway of the Commonwealth].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of not more than $250.

Sources & Authority

Governing Statutes:

Va. Code Ann. § 4.1-1107.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.527

Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus

The defendant is charged with the crime of [possessing or consuming] **marijuana or marijuana products while operating a school bus and transporting children. The Commonwealth must prove beyond a reasonable doubt that the defendant** [possessed or consumed] **marijuana or marijuana products while operating a school bus and transporting children.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [possessed or consumed] **marijuana or marijuana products while operating a school bus and transporting children, then you shall find the defendant not guilty.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [possessed or consumed] marijuana or marijuana [in a public place] [in a motor vehicle while operating, [the use of] a motor vehicle upon a public way, street, highway or way to which the public has a right of access for motor vehicles], [in a school bus] [in a motor vehicle while operating a school bus and transporting children],

Instruction No. P22.527

Possessing or Consuming Marijuana or Marijuana Products While Operating a School Bus

You have found the defendant guilty of the crime of [possessing or consuming] **marijuana or marijuana products while operating a school bus and transporting children.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for not more than one (1) year; or

(2) A fine of a specific amount, but not more than $2,500.00; or

(3) Confinement in jail for not more than one (1) year and a fine of a specific amount, but not more than $2,500.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1110.

Practice Commentary: "School bus" has the same meaning as provided in Va. Code. Ann. § 46.2-100.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.528

Carrying Marijuana or Marijuana Products in Motor Vehicle Used or Licensed to Transport Passengers for Hire

The defendant is charged with the crime of transporting marijuana or marijuana products in a motor vehicle that was being used [or was licensed] **for the transportation of passengers for hire. The Commonwealth must prove beyond a reasonable doubt that the defendant transported marijuana or marijuana products in a motor vehicle that was being used** [or was licensed] **for the transportation of passengers for hire.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant transported marijuana or marijuana products in a motor vehicle that was being used or was licensed for the transportation of passengers for hire, then you shall find the defendant not guilty.

to Transport Passengers for Hire.

If you find from the evidence that the Commonwealth has proved beyond a
passengers for hire, then you shall find the defendant not guilty.

Instruction No. P22.528

Carrying Marijuana or Marijuana Products in Motor Vehicle Used or Licensed to Transport Passengers for Hire

You have found the defendant guilty of the crime of transporting marijuana or marijuana products in a motor vehicle that was being used [or was licensed] **for the transportation of passengers for hire.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for not more than one (1) year; or

(2) A fine of a specific amount, but not more than $2,500.00; or

(3) Confinement in jail for not more than one (1) year and a fine of a specific amount, but not more than $2,500.00.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 4.1-1112.

Practice Commentary: These instructions should be used only for offenses occurring on or after July 1, 2021.

Instruction No. 22.600

Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to Persons Under 18

The defendant is charged with the crime of [distributing; causing a person under 18 years of age to assist in distributing] [marijuana; (name of drug which is a Schedule I, II, III or IV controlled substance)] **to a person under 18 years of age, who is at least 3 years younger than the defendant. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant knowingly or intentionally** [distributed; caused a person under 18 years of age to assist in distributing] [marijuana; (name of drug)] **to** (name of person to whom distribution was made); **and**

(2) **That** (name of person to whom distribution was made) **was under the age of 18 years at the time of the distribution and at least 3 years younger than the defendant; and**

(3) **That the defendant was, at the time of distribution, at least 18 years of age.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to Persons Under 18

The defendant, a person charged with the crime of [distributing or causing a person (if [illegible]) to distribute] [marijuana] [any other substance which is a Schedule I, II, III or IV controlled substance] to a person under 18 years of age, who was at least 3 years younger than the defendant. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant knowingly or intentionally [distributed] [caused a person under 18 years of age to assist in distributing] [marijuana] (name of drug) to person [illegible]

(2) That (name of person to whom distribution was made) was under the age of 18 years at the time of the distribution and at least 3 years younger than the defendant; and

(3) That the defendant was, at the time of distribution, at least 18 years of age.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P22.600

Schedule I, II, III or IV Controlled Substance, Marijuana—Distribution to Persons Under 18

You have found the defendant guilty of the crime of [distributing; causing a person under 18 years of age to assist in distributing] [marijuana; (name of drug which is a Schedule I, II, III, or IV controlled substance),] **to a person under 18 years of age, who is at least 3 years younger than the defendant.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at not less than ten (10) years nor more than fifty (50) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-255(A), 54.1-3446, 54.1-3448, 54.1-3450.

CASE AUTHORITY:

Kelso v. Commonwealth, 282 Va. 134, 137–38, 710 S.E.2d 470 (2011); *Williams v. Commonwealth, 213 Va. 45, 45–47, 189 S.E.2d 378, 379–80 (1972).*

PRACTICE COMMENTARY: In *Williams*, the defendant was tried for selling drugs to a minor. The Supreme Court of Virginia held that the age of the person to whom distribution was made cannot be proven by introduction of his arrest record: such evidence of age is hearsay. *213 Va. at 45–47, 189 S.E.2d at 379–80.*

Va. Code Ann. § 18.2-255(B) relates to "any imitation controlled substance" and makes that crime a Class 6 felony. An appropriate instruction can be drawn using this instruction as a model.

ALERTS:

• Va. Code Ann. § 18.2-255 also prohibits causing a person under 18 years of age to assist in distribution. See *Kelso, 282 Va. at 137–38, 710 S.E.2d at 472.*

• Va. Code Ann. § 18.2-248.1:1, relating to "synthetic cannabinoids," is repealed effective July 1, 2014. On that date, the term "cannabimimetic agents" was substituted for the term "synthetic cannabinoids," and "cannabimimetic agents" are now placed on the list of controlled substances in Schedule I, where they are subject to the same penalties as those for other Schedule I controlled substances with the exception of simple possession, which is penalized as a Class 1 misdemeanor instead of a Class 5 felony. Va. Code Ann. § 54.1-3446(6). For the definition of "controlled substance," see Va. Code Ann. § 54.1-3401. For the definition of "cannabimimetic agents" and a list of "cannabimimetic agents," see Va. Code Ann. § 54.1-3446(6) (Schedule I List). Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" now includes a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog,"

see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.610

Methamphetamine Precursor Chemicals—Possession with Intent to Manufacture Methamphetamine, Methcathinone or Amphetamine

The defendant is charged with the crime of possessing substances with intent to manufacture methamphetamine, methcathinone or amphetamine.

The Commonwealth must prove beyond a reasonable doubt: (1) that the defendant possessed (names of two or more substances listed in Va. Code Ann. § 18.2-248(J)); **and (2) that the defendant possessed these substances with the intent to manufacture methamphetamine, methcathinone or amphetamine.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements, then you shall find the defendant not guilty.

Instruction No. P22.610

Methamphetamine Precursor Chemicals—Possession with Intent to Manufacture Methamphetamine, Methcathinone or Amphetamine

You have found the defendant guilty of the crime of possessing substances with the intent to manufacture methamphetamine, methcathinone or amphetamine.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-248(J), (K).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.650

Controlled Substance, Imitation Controlled Substance, Marijuana—Manufacture, Distribution, or Possession With Intent to Distribute on or Near Educational, Child Day Center or Recreational Property

The defendant is charged with the crime of [distributing; manufacturing; possessing with intent to distribute] [marijuana; (name of controlled substance); (name of imitation controlled substance)] [on school property; on licensed child day center property; within 1000 feet of school property; within 1000 feet of licensed child day center property; on a school bus; at a school bus stop; within 1000 feet of a bus stop during the time when school children are waiting to be picked up or are being dropped off; upon property of a recreation or community center; upon property of a public library; upon property of a state facility or within 1000 feet of such institution]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [distributed; manufactured; possessed with intent to distribute] [marijuana; (name of controlled substance); (name of imitation controlled substance)]**; and**

(2) **That the** [distribution; manufacture; possession with intent to distribute] **was upon** [property of a school; property of a licensed child day center; [public property; property open to public use] within 1000 feet of a [school; licensed child day center]; a school bus; a designated school bus stop; [public property; property open to public use] within 1000 feet of the bus stop when children are [waiting to be picked up and transported; being dropped off] from school or school sponsored activity; the property of any [public library; publicly owned or operated recreation or community center]; property of a state facility; [public property; property open to public use] within 1000 feet of a state facility.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

The defendant is charged with the crime of [distributing; manufacturing; possession with intent to distribute] [marijuana; (name of controlled substance)] [upon property within 1000 feet of school property; within 1000 feet of licensed child day care property; upon property of a recreation or community center; upon property of a public facility; upon property of a state facility or within 1000 feet of such facility]. The elements of this crime are:

1. That the defendant [distributed; manufactured; possessed with intent to distribute] [marijuana; (name of controlled substance)]; and

2. That the [distribution; manufacture; possession with intent to distribute] was upon [property of a school; property of a licensed child day center; [public property; property open to public use] within 1000 feet of a [school; licensed child day center]; a school bus; a designated school bus stop; [public property; owned or operated recreation or community center]; property of a state facility; [public property; property open to public use] within 1000 feet of a state facility.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [or you shall fix his punishment at] as has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements, then you shall find the defendant not guilty.

Instruction No. P22.650

Controlled Substance, Imitation Controlled Substance, Marijuana—Manufacture, Distribution, or Possession With Intent to Distribute on or Near Educational, Child Day Center or Recreational Property

You have found the defendant guilty of the felony of [distributing; manufacturing; possessing with intent to distribute] [marijuana; (name of controlled substance); (name of imitation controlled substance)] [upon school property; upon licensed child day center property; within 1000 feet of school property; within 1000 feet of licensed child day center property; on a school bus; at a school bus stop; within 1000 feet of a bus stop during the time when school children are waiting to be picked up or are being dropped off; upon property of a publicly owned or operated recreation or community center; upon property of a public library; upon property of a state facility; within 1000 feet of a state facility].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at imprisonment for a specific term, but not less than one (1) year nor more than five (5) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-255.2, 37.2-100, 46.2-100, 54.1-3446, 54.1-3448, 54.1-3450, 54.1-3452, 63.2-100.

CASE AUTHORITY:

Fullwood v. Commonwealth, 279 Va. 531, 534–38, 689 S.E.2d 742, 744–46 (2010); Toliver v. Commonwealth, 38 Va. App. 27, 31–34, 561 S.E.2d 743, 746–47 (2002); Hughes v. Commonwealth, 33 Va. App. 405, 406–09, 533 S.E.2d 649, 650–51 (2000); Commonwealth v. Burns, 240 Va. 171, 174–79, 395 S.E.2d 456, 457–60 (1990).

PRACTICE COMMENTARY: A licensed child day center must be clearly marked and must meet the definition set forth in Va. Code Ann. § 63.2-100.

A school bus must meet the definition set forth in Va. Code Ann. § 46.2-100.

A state facility must meet the definition set forth in Va. Code Ann. § 37.2-100.

An apartment parking lot that is readily accessible to members of the public, including those who were not residents or whose presence was not authorized, was open to public use even though "no trespassing" signs were posted on the premises of the apartment complex. The statute only requires that the property be open to public use, regardless of whether that use is legal. *Fullwood, 279 Va. at 537–38, 689 S.E.2d at 746.*

Two distinct sales of drugs within 1000 feet of school property constitute separate offenses and do not violate double jeopardy by exposing the defendant to multiple punishments for the same offense. *Fullwood, 279 Va. at 539–40, 689 S.E.2d at 747.*

The "Drug-Free Zone Act," Va. Code Ann. § 18.2-255.2, was held constitutional in *Burns, 240 Va. at 174–79, 395 S.E.2d at 457–60.*

In *Toliver, 38 Va. App. at 31–34, 561 S.E.2d at 745–47*, the Court of Appeals construed Va. Code Ann. § 18.2-255.2 as requiring proof of intent to distribute on or near school property. Va. Code Ann. § 18.2-255.2 makes it clear that the statute can be violated regardless of where the defendant intended to distribute the drugs.

ALERTS:

• Effective July 1, 2021, pursuant to Va. Code Ann. § 4.1-1108, the consumption of marijuana or a marijuana product or offering of marijuana or a marijuana product to another, whether accepted or not, in a public place is not a crime, but rather subject to a civil penalty of $25.00 for a first offense, and subject to a civil penalty of $25.00 and referral to a substance abuse or treatment program for a second offense. A person convicted of this offense for a third or subsequent time is guilty of a Class 4 misdemeanor.

• The General Assembly has repealed Va. Code Ann. § 18.2-250.1 as of July 1, 2021. Effective on that date and thereafter, Va. Code Ann. § 4.1-1100 provides that

a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product.

• Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

• Care should be taken to conform the instruction to the statutory language, in order to cover prohibited transactions on specific types of property.

• If the defendant proves that he sold the substance only as an accommodation to another individual and not with intent to profit thereby or to induce the recipient to use or become addicted to or dependent upon the substance, then the crime is reduced to a Class 1 misdemeanor. The instruction would have to be adjusted to conform to the accommodation, as is done in Instruction Nos. 22.240, 22.260, 22.360, 22.370.

• Distribution of marijuana and possession with intent to distribute marijuana are also prohibited by Va. Code Ann. § 18.2-248.1, and the penalties imposed by Va. Code Ann. § 18.2-248.1 are different from those imposed by Va. Code Ann. § 18.2-255.2. Manufacture of marijuana is also prohibited by Va. Code Ann. § 18.2-248.1, and the penalties imposed by Va. Code Ann. § 18.2-248.1 are different from those imposed by Va. Code Ann. § 18.2-255.2.

• By amendment effective July 1, 2020, Va. Code Ann. § 18.2-248.1 provides a rebuttable presumption that a person who possesses no more than one ounce of marijuana possesses it for personal use.

• Manufacture, distribution, and possession with intent to distribute a controlled substance or an imitation controlled substance are also prohibited by Va. Code Ann. § 18.2-248, and the penalties imposed by Va. Code Ann. § 18.2-248 are different from those imposed by Va. Code Ann. § 18.2-255.2.

• Manufacture of methamphetamine is also prohibited by Va. Code Ann. § 18.2-248(C1) and the penalties imposed by Va. Code Ann. § 18.2-248(C1) are different from those imposed by Va. Code Ann. § 18.2-255.2.

• Distribution of marijuana or Schedule I, II or III controlled substances to persons under 18 are also prohibited by Va. Code Ann. § 18.2-255, and the penalties imposed by Va. Code Ann. § 18.2-255 are different from those imposed by Va. Code Ann. § 18.2-255.2.

• Va. Code Ann. § 18.2-248.1:1, relating to "synthetic cannabinoids," was repealed effective July 1, 2014. On that date, the term "cannabimimetic agents"

was substituted for the term "synthetic cannabinoids," and "cannabimimetic agents" are now placed on the list of controlled substances in Schedule I, where they are subject to the same penalties as those for other Schedule I controlled substances with the exception of simple possession, which is penalized as a Class 1 misdemeanor instead of a Class 5 felony. Va. Code Ann. § 54.1-3446(6). For the definition of "controlled substance," see Va. Code Ann. § 54.1-3401. For the definition of "cannabimimetic agents" and a list of "cannabimimetic agents," see Va. Code Ann. § 54.1-3446(6) (Schedule I List). Simple possession of cannabimimetic agents is covered by Instruction Nos. 22.500(a) and P22.500(b).

• Va. Code Ann. § 54.1-3443(D) authorizes the Board of Pharmacy to place substances, including controlled substance analogs (a substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II and that has or is intended to have the same or a greater stimulant, depressant, or hallucinogenic effect on the central nervous system), into the list of controlled substances found in Schedule I or II through an expedited regulatory process. A substance added to this list through the expedited process is removed from such list after 18 months unless a general law is enacted adding the substance to such list. Such controlled substance analogs are subject to the same penalties as those for the actual drug or class of drugs which it imitates. Va. Code Ann. § 54.1-3456. The term "controlled substance" will include a controlled substance analog that the Board has placed onto Schedule I or II through this expedited regulating process. Va. Code Ann. § 54.1-3401. For the definition of "controlled substance analog," see Va. Code Ann. § 54.1-3401. For the Schedule I list, see Va. Code Ann. § 54.1-3446.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.700

Drug Paraphernalia—Sale or Possession With Intent to Sell

The defendant is charged with the crime of [selling; possessing with intent to sell] **drug paraphernalia. The Commonwealth must prove beyond a reasonable doubt that the defendant** [sold; possessed with intent to sell] **drug paraphernalia.**

Drug paraphernalia means any equipment, product or material either designed for use or intended by the defendant for use in [processing; growing; packaging; introducing into the human body] [a controlled substance; marijuana].

If you find from the evidence that the defendant [sold; possessed with intent to sell] **drug paraphernalia, then you shall find the defendant guilty** [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [sold; possessed with intent to sell] **drug paraphernalia, then you shall find the defendant not guilty.**

Instruction No. P22.700

Drug Paraphernalia—Sale or Possession With Intent to Sell

You have found the defendant guilty of [selling; possessing with intent to sell] **drug paraphernalia.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-265.1, 18.2-265.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-265.3 provides that any adult who "distributes" drug paraphernalia to a minor is guilty of a Class 1 misdemeanor. But, any person 18 years of age or older who is guilty of selling drug paraphernalia to a minor at least 3 years his junior is guilty of a Class 6 felony. See Va. Code Ann. § 18.2-265.3(B), Instruction No. G22.701.

ALERTS:

• See Va. Code Ann. § 18.2-265.1 for a list of items which may constitute drug paraphernalia and for additional alternatives to "processing," "growing," etc. For uses in addition to planting, propagating, etc., see list in Va. Code Ann. § 18.2-265.3.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.701

Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant

The defendant is charged with the crime of selling drug paraphernalia to a person under 18 years of age who is at least 3 years younger than the defendant. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant sold drug paraphernalia to** (name of person to whom paraphernalia was sold)**; and**

(2) **That** (name of person to whom paraphernalia was sold) **was under the age of 18 years at the time of the distribution and at least 3 years younger than the defendant; and**

(3) **That the defendant, at the time of the sale, was at least eighteen (18) years of age.**

If you find from the evidence that the Commonwealth has proved each of the elements of the crime set out above beyond a reasonable doubt, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove one or more of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant

The defendant is charged with one count of selling drug paraphernalia to a person under 18 years of age who is at least 3 years younger than the defendant. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the offense:

(1) That the defendant sold drug paraphernalia to (name of person to whom paraphernalia was sold); and

(2) That (name of person to whom paraphernalia was sold) was under 18 years of age and at least 3 years younger than the defendant; and

(3) That the defendant, at the time of the sale, was at least eighteen (18) years of age.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of these elements, then you shall find the defendant guilty. If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of these elements, then you shall find the defendant not guilty.

Instruction No. P22.701

Drug Paraphernalia—Sale to Person Who Is At Least 3 Years Younger Than The Defendant

You have found the defendant guilty of the crime of selling drug paraphernalia to (name of person to whom paraphernalia was sold), **a person who is at least 3 years younger than the defendant.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-265.1, 54.1-3401.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-265.3 provides that any adult who "distributes" drug paraphernalia to a minor is guilty of a Class 1 misdemeanor. Any person of 18 years of age or older who is guilty of selling drug paraphernalia to a minor at least 3 years his junior is guilty of a Class 6 felony.

ALERTS:

- See Instruction No. 22.702 for a definition of "drug paraphernalia."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.702

Drug Paraphernalia—Definition

"Drug paraphernalia" means any equipment, product or material either designed for use or intended by the defendant for use in [processing; growing; packaging; introducing into the human body] [a controlled substance; marijuana].

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-265.1, 18.265.2, 18.2-265.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See Va. Code Ann. § 18.2-265.1 for a list of items which may constitute drug paraphernalia and for additional alternatives to "processing," "growing," etc. For uses in addition to planting, propagating, etc., see list in Va. Code Ann. § 8.2-265.3.

ALERTS:

• This instruction should only be used in conjunction with Instructions Nos. 22.701 and/or P22.701. The term "drug paraphernalia" as used in other model instructions has a different meaning. See Case Authority and Practice Commentary following Instruction No. P22.720.

• Effective July 1, 2020, simple marijuana possession under Va. Code Ann. § 18.2-250.1 was no longer a state crime. On and after that date, and until July 1, 2021, any person who violates Va. Code Ann. § 18.2-250.1 is subject to a civil penalty of no more than $25.00. The General Assembly repealed Va. Code Ann. § 18.2-250.1 as of July 1, 2021. Effective on that date and thereafter, Va. Code Ann. § 4.1-1100 provides that a person may lawfully possess one ounce of marijuana or an equivalent amount of marijuana product.

• Effective July 1, 2021, and notwithstanding the provisions of Va. Code Ann. § 18.2-248.1(c), Va. Code Ann. § 4.1-1101 provides that a person 21 years of age or older may cultivate up to four marijuana plants per household at the person's main place of residence.

• Effective July 1, 2021, Va. Code Ann. § 4.1-1101.1 provides that notwithstanding the provisions of Va. Code Ann. § 18.2-248.1, no civil or criminal penalty may be imposed for adult sharing of an amount of marijuana that does not exceed one ounce or an equivalent amount of marijuana products. "Adult sharing" means the transfer of marijuana or marijuana products between persons who are 21 years of age or older without remuneration. It does not include instances in which (i) marijuana is given away contemporaneously with another reciprocal transaction between the same parties; (ii) a gift of marijuana is offered or advertised in conjunction with an offer for the sale of goods or services; or (iii) a gift of marijuana is contingent upon a separate reciprocal transaction for goods or services. Va. Code Ann. § 4.1-1101.1(A).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.720

Drug Paraphernalia—Possession

The defendant is charged with the crime of possession of drug paraphernalia. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant possessed** (name of drug paraphernalia listed in Va. Code Ann. § 54.1-3466); **and**

(2) **That he did so under circumstances which reasonably indicated an intention to use the** (name of drug paraphernalia listed in Va. Code Ann. § 54.1-3466) **for purposes of illegally administering any controlled drug.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P22.720

Drug Paraphernalia—Possession

You have found the defendant guilty of the crime of possession of drug paraphernalia.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 54.1-3466.

CASE AUTHORITY:

Battle v. Commonwealth, 12 Va. App. 624, 626–27, 406 S.E.2d 195, 195–96 (1991); Murray v. Commonwealth, 225 Va. 13, 15–17, 300 S.E.2d 740, 741–43 (1983).

PRACTICE COMMENTARY: Va. Code Ann. § 54.1-3466 also makes it a misdemeanor to possess gelatin capsules, glassine envelopes, etc., with intent to use for the illegal manufacture, distribution or dispensing of a controlled drug.

ALERTS:

• The items identified as drug paraphernalia in Va. Code Ann. § 54.1-3466 are not the same as those defined as drug paraphernalia in Va. Code Ann. § 18.2-265.1 (see Instruction No. 22.700) or the items listed in Va. Code Ann. § 18.2-255.1 (see Instruction No. 22.740). Scales are not paraphernalia under Va. Code Ann. § 54.1-3466 but they are under Va. Code Ann. § 18.2-265.1. Under the former "possession" alone is sufficient to convict. Under the latter (and Va. Code Ann. § 18.2-265.3) there must be a sale or possession with the intent to sell. Each is a Class 1 misdemeanor. *Battle, 12 Va. App. at 626–27, 406 S.E.2d at 195–96.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.740

Drug Paraphernalia—Sale to Minor of Printed Matter Advertising Instruments for Administering Marijuana or Controlled Substances

The defendant is charged with the crime of [selling; distributing; displaying for sale] to a minor printed matter which advertised drug paraphernalia. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant knowingly [sold; distributed; displayed for sale] **printed matter;**

(2) To a person under the age of 18 years; and

(3) That he knew the printed matter advertised drug paraphernalia for sale.

"Drug paraphernalia" means any instrument, device, article or contrivance advertised for use in unlawfully ingesting, smoking, administering, preparing or growing marijuana or a controlled substance.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P22.740

Drug Paraphernalia—Sale to Minor of Printed Matter Advertising Instruments for Administering Marijuana or Controlled Substances

You have found the defendant guilty of the crime of selling to a minor printed matter which advertised drug paraphernalia.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-255.1.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: In addition to sales, the statute encompasses distribution and display for sale. Printed matter includes books, periodicals and pamphlets.

ALERTS:

• Without reference to the term "drug paraphernalia," Va. Code Ann. § 18.2-255.1 prohibits "sale to a minor [of] any . . . printed matter which . . . advertises for sale any instrument, device, article, or contrivance for advertised use in unlawfully ingesting, smoking, administering, preparing or growing marijuana or a controlled substance." In drafting the instruction, the Committee used "drug paraphernalia" in the first paragraph and defined that term using statutory language in the second paragraph of the instruction. Other definitions of drug paraphernalia are found in Va. Code Ann. §§ 18.2-265.1 and 54.1-3466. Scales are not paraphernalia under Va. Code Ann. § 54.1-3466 but they are under Va. Code Ann. § 18.2-265.1. Under the former "possession" alone is sufficient to convict. Under the latter (and Va. Code Ann. § 18.2-265.3) there must be a sale or possession with the intent to sell. Each is a Class 1 misdemeanor. *Battle v. Commonwealth, 12 Va. App. 624, 626–27, 406 S.E.2d 195, 195–96 (1991).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.800

Imitation Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

The defendant is charged with the crime of [distributing; manufacturing; selling; giving; possessing with intent to sell, give or distribute] **an imitation controlled substance. The Commonwealth must prove beyond a reasonable doubt that the defendant** [distributed; manufactured; sold; gave; possessed with intent to sell, give or distribute] **an imitation controlled substance.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant [distributed; manufactured; sold; gave; possessed, with intent to sell, give or distribute] **an imitation controlled substance, then you shall find the defendant not guilty.**

Instruction No. P22.800

Imitation Controlled Substance—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

You have found the defendant guilty of the crime of [distributing; manufacturing; selling; giving; possessing with intent to sell, give or distribute] **an imitation controlled substance.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-247, 18.2-248(A), (F), (G).

CASE AUTHORITY:

Powell v. Commonwealth, 289 Va. 20, 28–31, 766 S.E.2d 736, 740–41 (2015); *Werres v. Commonwealth, 19 Va. App. 744, 747–48, 454 S.E.2d 36, 38 (1995).*

PRACTICE COMMENTARY: Distribution of "any imitation controlled substance" by a person at least 18 years of age to a person under 18 years of age and at least 3 years his junior is a Class 6 felony. Va. Code Ann. § 18.2-255. See Instruction No. 22.600. See also Instruction No. 22.650 in connection with offenses involving imitation controlled substances on or near the educational or recreational property specified in Va. Code Ann. § 18.2-255.2.

"Imitation controlled substance" is defined in Va. Code Ann. § 18.2-247(B). See Va. Code Ann. § 18.2-247(C) for a listing of factors to be considered in determining whether a pill, capsule, tablet or substance in any other form is an "imitation controlled substance." See also Va. Code Ann. § 18.2-248(B) for additional factors to be considered when determining intent to manufacture, sell, give or distribute an imitation controlled substance.

In *Powell*, the Supreme Court of Virginia affirmed the conviction for distribution of a Schedule I or II imitation controlled substance where the hard white tablet, which was actually Quetiapine (a Schedule VI controlled substance), was packaged as crack cocaine in a knotted plastic baggie; common drug slang for cocaine was used during the transaction; and the sale took place in an "open air drug market." *Powell, 289 Va. at 30–31, 766 S.E.2d at 741*. Pursuant to Va. Code Ann. § 18.2-247(B), an imitation controlled substance can be a substance "which is not a controlled substance subject to abuse." Because the Board of Pharmacy included Quetiapine as a Schedule VI controlled substance, it is not a controlled substance subject to abuse. See *Id. at 28–31, 766 S.E.2d at 740–41*.

The Commonwealth is no longer required to prove the identity of the imitation controlled substance or that the imitation controlled substance is subject to abuse. *Werres, 19 Va. App. at 748, 454 S.E.2d at 38*; Va. Code Ann. § 18.2-247. See Instruction No. 22.805 for the definition of imitation controlled substance. When under the facts of a case there is an issue of whether the substance is an imitation controlled substance, Instruction No. 22.805 should also be given.

Knowing and intentional possession is defined in Instruction No. 22.330. See the cases cited in the Case Authority and the Practice Commentary for a discussion of the facts and circumstances that constitute possession. This instruction should also be given when possession of the imitation substance is an issue.

The definition of intent to distribute is contained in Instruction No. 22.350. The factors to be considered in determining intent to distribute are set forth in Instruction No. 22.350. See the cases cited in the Case Authority and the Practice Commentary for a discussion of the factors to be considered in determining intent

to distribute. This instruction should also the given if intent to distribute is an issue.

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

***ALERTS*:**

• The type of controlled substance being imitated determines the punishment. A violation involving a Schedule I, II, III, or IV imitation substance is a Class 6 felony. Va. Code Ann. § 18.2-248(G). A violation involving a Schedule V or VI imitation substance is a Class 1 misdemeanor. Va. Code Ann. § 18.2-248(F). The instruction is for the felony. For an instruction covering anabolic steroids, see Instruction No. 22.900.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists §§ 1, 2, 5

Instruction No. 22.805

Imitation Controlled Substance—Definition

An imitation controlled substance is a pill, capsule, tablet, or substance in any form which is not a controlled substance subject to abuse and which [by overall appearance, including dosage, color shape, size, marking, packaging, or representations cause the likelihood that it will be mistaken for a controlled substance; by express or implied representations purports to act like a controlled substance as stimulant or depressant of the central nervous system, and which is not commonly used or recognized for use for any purpose other than for such stimulant or depressant effect].

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-247(B).

CASE AUTHORITY:

Powell v. Commonwealth, 289 Va. 20, 28–31, 766 S.E.2d 736, 740–41 (2015); *Werres v. Commonwealth, 19 Va. App. 744, 747, 454 S.E.2d 36, 38 (1995).*

PRACTICE COMMENTARY: A controlled substance can also be a counterfeit controlled substance. The definition of a counterfeit controlled substance is contained in Va. Code Ann. § 18.2-247(E). The instruction should be modified to fit this definition if the case involves a counterfeit controlled substance.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.900

Anabolic Steroid—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

The defendant is charged with the crime of knowingly [distributing; manufacturing; possessing with intent to distribute] **an anabolic steroid. The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly** [distributed; manufactured; possessed with intent to distribute] **an anabolic steroid.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant knowingly [distributed; manufactured; possessed with intent to distribute] **an anabolic steroid, then you shall find the defendant not guilty.**

Instruction No. P22.900

Anabolic Steroid—Manufacturing, Selling, Giving, Distributing, or Possessing With Intent to Manufacture, Sell, Give or Distribute

You have found the defendant guilty of the crime of [distributing; manufacturing; possessing with intent to distribute] **an anabolic steroid.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $20,000; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $20,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.5.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-248.5 also makes it a Class 1 misdemeanor to distribute, without prescription, to a minor a pill, capsule or tablet containing any combination of caffeine and ephedrine sulfate; no instruction has been prepared for this offense.

In *Bennett v. Commonwealth, 69 Va. App. 475, 820 S.E.2d 390 (2018)*, the Court of Appeals held that circumstantial evidence was sufficient to support a defendant's conviction for drug distribution, pursuant to Va. Code Ann. § 18.2-248, where the informant had died, and was thus unavailable to testify. Circumstantial evidence "is entitled to as much weight as direct evidence, provided it is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." *Id.* (citations omitted).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

Instruction No. 22.910

Transporting Controlled Substances Into The Commonwealth

The defendant is charged with the crime of transporting into the Commonwealth by any means with intent to sell or distribute [one ounce or more of cocaine, coca leaves or any salt, compound, derivative or preparation thereof; one ounce or more of any Schedule I or II controlled substance; five or more pounds of marijuana] The Commonwealth must prove beyond a reasonable doubt that the defendant transported into the Commonwealth by any means with intent to sell or distribute (name and triggering quantity of drug).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt that the defendant:

(1) Transported by any means;

(2) (Name and triggering quantity of drug);

(3) Into the Commonwealth;

(4) With intent to sell or distribute.

Then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements above, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements above, then you shall find the defendant not

Instruction No. P22.910

Transporting Controlled Substances Into The Commonwealth

You have found the defendant guilty of the crime of transporting into the Commonwealth by any means with intent to sell or distribute (name and triggering quantity of drug).

You shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years and a fine of a specific amount, but not more than $1,000,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-248.01.

CASE AUTHORITY:

Shackleford v. Commonwealth, 262 Va. 196, 209–11, 547 S.E.2d 899, 907–08 (2001); *Ford v. Commonwealth, 55 Va. App. 598, 608–09, 687 S.E.2d 551, 556 (2010)*; *Washington v. Commonwealth, 43 Va. App. 291, 307, 597 S.E.2d 256, 264 (2004)*; *Kelly v. Commonwealth, 41 Va. App. 250, 257–61, 584 S.E.2d 444, 447–49 (2003)*; *Green v. Commonwealth, 32 Va. App. 438, 448–50, 528 S.E.2d 187, 192–93 (2000)*; *Seke v. Commonwealth, 24 Va. App. 318, 325, 482 S.E.2d 88, 91 (1997)*.

PRACTICE COMMENTARY: A second or subsequent offense, if charged and proven, carries a range of sentence from 10 years to 40 years. Ten years is a mandatory minimum sentence. On a first offense the statute sets a 3-year mandatory minimum. Va. Code Ann. § 18.2-248.01.

***ALERTS*:**

None

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.12

MICHIE'S JURISPRUDENCE, Drugs and Druggists, §§ 1, 2, 5

CHAPTER 23

EMBEZZLEMENT

Scope Note

Instruction No. 23.100 Embezzlement

Instruction No. P23.100(a) Embezzlement (Felony)

Instruction No. P23.100(b) Embezzlement (Misdemeanor)

Instruction No. 23.200 Converted—Definition

SCOPE NOTE

This section covers the principal crimes contained in Chapter 5, Article 4 of Title 18.2 of the Code of Virginia, pertaining to embezzlement and fraudulent conversion. Although Instruction No. 23.100 pertains only to Va. Code Ann. § 18.2-111, the basic embezzlement statute, it may be used as a model for instructions in cases charging more specific types of embezzlement. Va. Code Ann. § 18.2-111.2, for example, addresses failure of an employer to pay out monies withheld from employees' pay as child support payments. Va. Code Ann. § 18.2-112 concerns embezzlement by officers, agents or employees of the state. Va. Code Ann. § 18.2-113 involves fraudulent entries in accounts by officers or clerks of financial institutions, joint stock companies, or corporations, and Va. Code Ann. § 18.2-112.1 concerns the use of public assets by a full-time officer, agent, or employee of the Commonwealth or political subdivision. Va. Code Ann. § 18.2-115 pertains to fraudulent conversion or removal of property subject to lien or title which is in another. Va. Code Ann. § 18.2-115.1 pertains to unlawful sublease of motor vehicles. Va. Code Ann. § 18.2-116 pertains to failure to pay for and return goods delivered for selection or on approval, while Va. Code Ann. § 18.2-117 pertains to failure of a bailee to return animals, aircraft, vehicles or boats. Finally, Va. Code Ann. § 18.2-118 pertains to fraudulent conversion or removal of leased personal property.

Instruction No. 23.200 defines "converted" as used in the context of embezzlement.

Instruction No. 23.100

Embezzlement

The defendant is charged with the crime of embezzlement. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant wrongfully and fraudulently** [converted to his own use; converted to the use of another; used; disposed of; concealed] (describe property) **with the intent to permanently deprive the rightful owner of the use thereof; and**

(2) **That the property was** [received by the defendant [for another; for his employer; for his principal; for his bailor; by virtue of his [office; trust; employment]]; entrusted or delivered to the defendant by [another; a court; a corporation; a company]]**; and**

(3) **That the value of the property was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of felony embezzlement, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime but has not proved beyond a reasonable doubt that the value of the property was $1,000 or more, and if you find beyond a reasonable doubt that the property was of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of misdemeanor embezzlement, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the first two elements of the crime, or that the Commonwealth has failed to prove beyond a reasonable doubt that the property was of some value, then you shall find the defendant not guilty.

Instruction No. P23.100(a)

Embezzlement (Felony)

You have found the defendant guilty of the crime of embezzlement.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P23.100(b)

Embezzlement (Misdemeanor)

You have found the defendant guilty of the crime of embezzlement.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-111, 18.2-95, 18.2-96, 18.2-152.8.

PRINCIPAL CASE AUTHORITY:

Leftwich v. Commonwealth, 61 Va. App. 422, 429, 737 S.E.2d 42, 46 (2013); *Wells v. Commonwealth, 60 Va. App. 111, 118–19, 724 S.E.2d 225, 229 (2012)*; *Brown v. Commonwealth, 56 Va. App. 178, 185–87, 692 S.E.2d 271, 274–75 (2010)*; *George v. Commonwealth, 276 Va. 767, 770–74, 667 S.E.2d 779, 780–83 (2008)*; *Dove v. Commonwealth, 41 Va. App. 571, 576–82, 586 S.E.2d 890, 893–95 (2003)*; *Tribuzi v. Commonwealth, 25 Va. App. 289, 293–94, 487 S.E.2d 870, 872–73 (1997)*; *Webb v. Commonwealth, 204 Va. 24, 34–35, 129 S.E.2d 22, 30 (1963)*; *Lee v. Commonwealth, 200 Va. 233, 235–37, 105 S.E.2d 152, 153–55 (1958)*.

OTHER RELEVANT DECISIONS:

DiMaio v. Commonwealth, 272 Va. 504, 509–10, 636 S.E.2d 456, 459–60 (2006); *Bragg v. Commonwealth, 42 Va. App. 607, 609–16, 593 S.E.2d 558, 559–62 (2004)*; *Commonwealth v. Bruhn, 264 Va. 597, 601–03, 570 S.E.2d 866, 868–69 (2002)*; *Nestle v. Commonwealth, 22 Va. App. 336, 341, 470 S.E.2d 133, 136 (1996)*; *Ratliff v. Commonwealth, 20 Va. App. 43, 46–48, 455 S.E.2d 259, 260–61 (1995)*; *Gwaltney v. Commonwealth, 19 Va. App. 468, 473–76, 452 S.E.2d 687, 690–92 (1995)*; *Zoretic v. Commonwealth, 13 Va. App. 241, 243–45, 409 S.E.2d 832, 833–34 (1991)*; *Chiang v. Commonwealth, 6 Va. App. 13, 17–18, 365 S.E.2d 778, 780–81 (1988)*; *Evans v. Commonwealth, 226 Va. 292, 296–98, 308 S.E.2d 126, 129 (1983)*; *Revell v. Commonwealth, 215 Va. 708, 709–10, 213 S.E.2d 756, 757 (1975)*; *Bain v. Commonwealth, 215 Va. 89, 93, 205 S.E.2d 641, 644 (1974)*.

PRACTICE COMMENTARY: ***Mens Rea.*** The mental element of the crime of embezzlement is the fraudulent intent to deprive the owner of his property and to appropriate it. *Bain, 215 Va. at 93, 205 S.E.2d at 644*. The appropriation can be either for the use of the person charged with the embezzlement or for the use of another. *Wells, 60 Va. App. at 118–19, 724 S.E.2d at 229*; *Chiang, 6 Va. App. at 17–18, 365 S.E.2d at 780–81*. In *Wells*, evidence was sufficient to sustain an embezzlement conviction where a department store sales clerk gave a customer unauthorized discounts on merchandise and gave the customer merchandise at no cost. *Id. at 121, 724 S.E.2d at 230*; see *Molash v. Commonwealth, 3 Va. App. 243, 247–48, 348 S.E.2d 868, 870–71 (1986)* (discussing required mens rea element under Va. Code Ann. § 18.2-117).

Va. Code Ann. § 18.2-112 (embezzlement by public officer) provides that the Commonwealth establishes a prima facie case of embezzlement when the public officer defaults in paying over funds coming into his custody under his official capacity. Va. Code Ann. § 18.2-117 (embezzlement by bailee for failure to return animal, aircraft, vehicle or boat) states that the Commonwealth establishes a prima

facie case of embezzlement when the bailee fails to return the property within five days from the time the bailee agreed in writing to return the property. Va. Code Ann. § 18.2-118 (fraudulent conversion or removal of leased personal property) states that the Commonwealth establishes a prima facie case if the lessee fails to return the property to the lessor within 30 days of the expiration of the lease or rental period stated in the written lease. Under these specific embezzlement statutes, an appropriate instruction should be given if supported by the facts of the case.

Embezzlement Instruction. This instruction was approved in *Wells* as having fully instructed the jury on the elements of embezzlement. *Wells, 60 Va. App. at 122, 724 S.E.2d at 230–31.* See also *George, 276 Va. at 770–74, 667 S.E.2d at 780–83* (discussing instruction similar to the model instruction and affirming defendant's conviction for embezzlement).

Fraud. The words "fraud" and "fraudulent" need not be defined in a jury instruction because they are words that are commonly used and have an accepted meaning. *Wells, 60 Va. App. at 123–24, 724 S.E.2d at 231.*

Embezzlement Statute. Va. Code Ann. § 18.2-111 provides three separate and distinct scenarios in which a person may be convicted of embezzlement: when a person misappropriates property (1) received for another or for his employer, or (2) by virtue of his office, trust or employment, or (3) which shall have been entrusted or delivered to him by another. Proof of any one scenario satisfies the statutory requirement. *Leftwich, 61 Va. App. at 428, 737 S.E.2d at 45.* In the third scenario, property may be "delivered" even if it was not "entrusted," as "delivered" is a separate and alternative element from "entrusted." *Pittman v. Commonwealth, 69 Va. App. 632, 637–38, 822 S.E.2d 382, 384–85 (2019).*

Embezzlement and Larceny. Va. Code Ann. § 18.2-111 provides that "[p]roof of embezzlement shall be sufficient to sustain the charge of larceny. Any person convicted hereunder shall be deemed guilty of larceny and may be indicted as for larceny . . ." The difference between larceny (after bailment) and embezzlement is that the former requires a trespassory taking while in the latter crime there is initially a lawful possession. *Maye v. Commonwealth, 213 Va. 48, 49, 189 S.E.2d 350, 351 (1972).* See Va. Code Ann. § 18.2-152.8 for a listing of computer-related personal property subject to embezzlement. See also the decision in *Evans* for a discussion of the value of a computer list. *Evans, 226 Va. at 296–97, 308 S.E.2d at 129.*

State Tax Withholding. Funds withheld by an employer from employees' wages for purposes of state income tax liability are funds held in trust for the Commonwealth pursuant to Va. Code Ann. § 58.1-474, and the wrongful and fraudulent use of such funds can be the basis of a prosecution for embezzlement from the Commonwealth. *George, 276 Va. at 774, 667 S.E.2d at 783.*

Petit Larceny Value Test. If the value of the property was less than $500, the petit larceny statute (Va. Code Ann. § 18.2-96) does not require proof of any minimum or specific value so long as the property has some value. *Evans, 226 Va.*

at 296–98, 308 S.E.2d at 129. Petit larceny is a Class 1 misdemeanor.

☞ ***PRACTICE POINTER*:**

Va. Code Ann. §§ 6.2-943, 6.2-1044, and 6.2-1062 provide the penalties for embezzlement by an officer, director, agent, or employee of a bank, trust company, or trust subsidiary.

☞ ***PRACTICE POINTER*:**

Va. Code Ann. § 6.2-945(A) proscribes as embezzlement receipt of deposits by any officer, director, or employee of an insolvent bank or broker, and provides its own special punishment, notwithstanding the provisions of Va. Code Ann. § 18.2-111: a fine of double the amount of the deposit received, and a term of imprisonment of not less than one nor more than three years for each offense.

☞ ***PRACTICE POINTER*:**

Va. Code Ann. § 18.2-112 makes misappropriation of funds by a public employee acting in his official capacity a felony, regardless of amount. *Gunn v. Commonwealth, 272 Va. 580, 637 S.E.2d 324 (2006).*

☞ ***PRACTICE POINTER*:**

The words "converted" and "misappropriated" are related concepts under the law of embezzlement. It is repetitious to use both words to instruct the jury on the elements of embezzlement. *Wells, 60 Va. App. at 122, 724 S.E.2d at 231.*

ALERTS:

• There is no embezzlement when property is taken under a bona fide claim of right. *Whitlow v. Commonwealth, 184 Va. 910, 918, 37 S.E.2d 18, 21 (1946).*

• The instruction as currently written includes the requirement that the defendant had an intent to "permanently" deprive the rightful owner of use of the property. The Court of Appeals has cited a variant of Instruction No. 23.100, which included "permanently," with approval. *Wells, 60 Va. App. at 122, 724 S.E.2d at 230–31.* While embezzlement is deemed larceny for the purposes of punishment, it is a distinct statutory offense. *Bruhn, 264 Va. at 602–03, 570 S.E.2d at 869.* The word "permanently" is not contained in Va. Code Ann. § 18.2-111. However, the statute provides that "any person convicted hereunder shall be deemed guilty of larceny and may be indicted as for larceny." These textual references to larceny suggest a permanent intent.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 11.1–11.5

MICHIE'S JURISPRUDENCE, Embezzlement, §§ 1–12

Instruction No. 23.200

Converted—Definition

"Converted" means the unauthorized and wrongful exercise of dominion and control over another's personal property, to the exclusion of or inconsistent with the rights of the owner.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Wells v. Commonwealth, 60 Va. App. 111, 122–23, 724 S.E.2d 225, 231 (2012); *Dove v. Commonwealth, 41 Va. App. 571, 577, 586 S.E.2d 890, 893 (2003)*; *Zoretic v. Commonwealth, 13 Va. App. 241, 243–45, 409 S.E.2d 832, 833–34 (1991)*; *Evans v. Commonwealth, 226 Va. 292, 296–98, 308 S.E.2d 126, 129 (1983).*

PRACTICE COMMENTARY: The words "converted" and "misappropriated" are related concepts under the law of embezzlement. It is repetitious to use both words to instruct the jury on the elements of embezzlement. *Wells, 60 Va. App. at 122–23, 724 S.E.2d at 231.*

"The mental element of the crime of embezzlement was a fraudulent purpose to deprive the owner of his property and to appropriate the same." *Bain v. Commonwealth, 215 Va. 89, 93, 205 S.E.2d 641, 644 (1974)* (quoting *Whitlow v. Commonwealth, 184 Va. 910, 918, 37 S.E.2d 18, 21 (1946)*).

Under Va. Code Ann. § 18.2-111, the defendant need not personally benefit in order to be guilty of embezzlement. It is sufficient to show that the defendant converted the property for the benefit of another. *Wells, 60 Va. App. at 118–19, 724 S.E.2d at 229.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 11.1–11.5

MICHIE'S JURISPRUDENCE, Embezzlement, §§ 1–12

CHAPTER 24

EXTORTION AND THREATS

Scope Note

Instruction No. 24.100 Extortion—General

Instruction No. P24.100 Extortion—General

Instruction No. 24.200 Stalking (Subsequent Offense)

Instruction No. P24.200 Stalking (Subsequent Offense)

Instruction No. 24.500 Threats—General

Instruction No. P24.500 Threats—General

Instruction No. 24.600 Threats on School Grounds, on School Buses, or at School-Sponsored Events

Instruction No. P24.600 Threats on School Grounds, on School Buses, or at School-Sponsored Events

Instruction No. 24.700 Threats to Intimidate the Population at Large

Instruction No. P24.700 Threats to Intimidate the Population at Large

SCOPE NOTE

Instruction No. 24.100 is based on Va. Code Ann. § 18.2-59, which prohibits extortion.

Instruction No. 24.200 covers stalking, third or subsequent offense, a Class 6 felony under Va. Code Ann. § 18.2-60.3(B). See *Woolfolk v. Commonwealth, 18 Va. App. 840, 853, 447 S.E.2d 530, 537 (1994)* (upholding constitutionality of stalking statute against vagueness and overbreadth challenges and affirming defendant's conviction).

Instruction No. 24.500 is based on Va. Code Ann. § 18.2-60(A)(1) and deals with the crime of threatening death or bodily injury by means of written or electronically transmitted communication. Instruction No. 24.600 is based on Va. Code Ann. § 18.2-60(A)(2) and deals with the crime of threats of action to take place on school grounds, school buses, and at school-sponsored events. A separate instruction has not been prepared for the specific crime of threatening to kill or to do bodily harm to any school employee while on a school bus, school property, or a school sponsored activity. Va. Code Ann. § 18.2-60(B)(i). Nor has a separate instruction been prepared for the crime of threatening to kill or to do bodily harm to any health care provider engaged in the performance of duties at a hospital or emergency room. Va. Code Ann. § 18.2-60(B)(ii). However, Instruction No. 24.600 may be adapted for this purpose. No instructions have been prepared based on Va. Code Ann. §§ 18.2-60.1 and 18.2-60.2, dealing with threats to the life and person of the Governor or members of his immediate family.

The following information about protective orders does not specifically relate to these instructions but may be useful. The violation of any provision of a protective order issued pursuant to Va. Code Ann. §§ 19.2-152.8, 19.2-152.9, or 19.2-152.10 is a Class 1 misdemeanor, unless it is a third violation committed under specific circumstances within a certain number of years, is committed while knowingly armed with a firearm or other deadly weapon, involves an assault and battery upon any party protected by the protective order which results in bodily injury, or where any person violates such protective order by furtively entering the home of any protected party while the party is present, or by entering and remaining in the home of the protected party until the party arrives. Va. Code Ann. § 18.2-60.4.

This chapter does not cover the Va. Code Ann. § 18.2-460 offenses relating to obstruction of justice by threats or force. See Instruction No. 35.100 and Instruction No. 35.300.

Instruction No. 24.100

Extortion—General

The defendant is charged with the crime of extortion. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [made a threat of injury to the [person; character; property] of another; accused another person of any offense; threatened to report another person as being illegally present in the United States; or knowingly destroyed, concealed, removed, confiscated, withheld, or threatened to withhold, passport or immigration document of another]**; and**

(2) **That such** [threat; accusation; action] **caused the person** [threatened; accused; affected] **or any other person to part with** [money; property; a pecuniary benefit; a note; a bond; other evidence of debt]; **and**

(3) **That the** [money; property; pecuniary benefit; note; bond; other evidence of debt] **was given by the person** [threatened; accused; affected] **or any other person** [to the defendant; to someone designated by the defendant].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P24.100

Extortion—General

You have found the defendant guilty of the felony of extortion.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-59.

CASE AUTHORITY:

DiMaio v. Commonwealth, 46 Va. App. 755, 767, 621 S.E.2d 696, 702 (2005), aff'd on other grounds, *272 Va. 504, 510, 636 S.E.2d 456, 460 (2006)*; *Strohecker v. Commonwealth, 23 Va. App. 242, 256–57, 475 S.E.2d 844, 851–52 (1996)*; *Stein v. Commonwealth, 12 Va. App. 65, 68–71, 402 S.E.2d 238, 240–42 (1991)*; *Wood v. Commonwealth, 8 Va. App. 560, 561, 382 S.E.2d 306, 307 (1989)*; *Mitchell v. Commonwealth, 75 Va. 856, 860–63 (1880)*.

PRACTICE COMMENTARY: Extortion is a Class 5 felony. However, the Virginia statute does not specify in what form the threat must be made to constitute the crime of extortion.

In Va. Code Ann. § 18.2-59, the word "extort" itself is used to define the crime of "extortion." The instruction has replaced "extort" with "caused" in the second element as a less confusing way of expressing this relationship. Additionally, the words, "was given" was substituted for "extort" in the third element. This substitution recognizes that "extort" does, in fact, require the successful exchange of the benefit. The clause "someone else designated by the defendant" was added because the statute does not indicate that the defendant must receive directly the benefit of the extortion. The key element of extortion is whether the defendant induced the exchange by his threat with the benefit going where he wanted it to go, rather than whether the defendant personally received the benefit.

The crime of extortion addresses the malice found in obtaining a benefit by threatening to harm another's character; the truthfulness of the underlying threat is immaterial. *Mitchell, 75 Va. at 860–63; Wood, 8 Va. App. at 561, 382 S.E.2d at 307.*

A bona fide claim of right is no defense to extortion. See *Strohecker, 23 Va. App. at 256–57, 475 S.E.2d at 851–52.*

In *Stein, 12 Va. App. at 68–71, 402 S.E.2d at 240–42*, the Court of Appeals rejected a challenge to the constitutionality of Va. Code Ann. § 18.2-59 founded upon assertions that it was vague and overbroad.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Extortion and Threats" and "Stalking"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 6.4, 19.1–19.4

MICHIE'S JURISPRUDENCE, Assault & Battery § 5; Extortion § 1; and Words & Phrases, "Extort" and "Threat"

Instruction No. 24.200

Stalking (Subsequent Offense)

The defendant is charged with the crime of stalking. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant on more than one (1) occasion engaged in conduct directed at (name of person)**;**

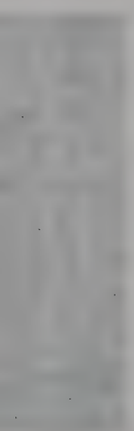
(2) That the defendant [by his conduct intended to place; knew, or reasonably should have known, that the conduct placed] (name of person) **in reasonable fear of** [death; criminal sexual assault; bodily injury] **to** [(name of person); a member of (name of person)'s family or household]**;**

(3) That the defendant has been convicted of stalking on a prior occasion;

(4) That the prior conviction occurred within the past five (5) years.

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, you shall find the defendant not guilty.



Instruction No. P24.200

Stalking (Subsequent Offense)

You have found the defendant guilty of stalking.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-60.3.

Case Authority:

Banks v. Commonwealth, 67 Va. App. 273, 280–88, 795 S.E.2d 908, 913–15 (2017); *Raja v. Commonwealth, 40 Va. App. 710, 725–27 581 S.E.2d 237, 244–45 (2003)*; *Stephens v. Rose, 288 Va. 150, 157, 762 S.E.2d 758, 762 (2014)*; *Bowen v. Commonwealth, 27 Va. App. 377, 380–81, 499 S.E.2d 20, 22 (1998); Parker v. Commonwealth, 24 Va. App. 681, 684–86, 485 S.E.2d 150, 152–53 (1997); Woolfolk v. Commonwealth, 18 Va. App. 840, 853, 447 S.E.2d 530, 537 (1994).*

Practice Commentary: Va. Code Ann. § 18.2-60.3(A) sets out the elements of a single offense of stalking, a Class 1 Misdemeanor. Va. Code Ann. § 18.2-60.3(B) addresses a second conviction for stalking "occurring within five years of a prior conviction" for violation of other enumerated criminal offenses, or a protective order. A conviction under Va. Code Ann. § 18.2-60.3(C) can be based on the previous conviction "for a similar offense under the law of any other jurisdiction." The standard for determining whether Defendant's conduct caused "reasonable fear of death" is an objective one. *Rose, 288 Va. at 157, 762 S.E.2d at 762.*

The stalking statute is not unconstitutionally vague on its face. *Woolfolk, 18 Va. App. at 853, 447 S.E.2d at 537; Parker, 24 Va. App. at 686–91, 485 S.E.2d at 153–55.*

Although Class 1 Misdemeanor Stalking carries a one-year statute of limitations, the passage of approximately 15 years between the defendant's two most recent instances of conduct toward the victim did not preclude his conviction for stalking, and the trial court did not err in allowing the jury to consider the evidence of the earlier conduct as probative of the "more than one occasion" element of the crime and in refusing proffered jury instructions, which would have limited the use of such evidence. *Banks v. Commonwealth, 67 Va. App. 273, 286–87, 795 S.E.2d 908, 914–15 (2017).*

For violation of a stalking protective order see Va. Code Ann. § 18.2-60.4.

As used in the governing statute, the term "family or household member" is defined in Va. Code Ann. § 16.1-228.

Alerts:

• Va. Code Ann. § 18.2-60.3(A) also provides: "If the person contacts or follows or attempts to contact or follow the person at whom the conduct is directed after being given actual notice that the person does not want to be contacted of followed, such actions shall be prima facie evidence that the person intended to place that other person, or reasonably should have known that the other person was placed, in reasonable fear of death, criminal sexual assault, or bodily injury to himself or a family or household member."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Extortion and Threats" and "Stalking"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 6.4, 19.1–19.4

MICHIE'S JURISPRUDENCE, Assault and Battery § 5; and Words & Phrases, "Threat"

Instruction No. 24.500

Threats—General

The defendant is charged with the crime of threatening another person with [death; bodily injury]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant knowingly communicated** [in writing; by an electronically transmitted communication producing a visual or electronic message] **to** (name recipient)**; and**

(2) **That the** [written communication; electronically transmitted communication producing a visual or electronic message] **contained a threat to** [kill; do bodily harm to] [(name recipient); any member of (name recipient)'s family]**; and**

(3) **That the threat to** [kill; do bodily harm] **placed** (name recipient) [in reasonable fear of death or bodily harm; in reasonable fear of death or bodily harm to a member of (name recipient)'s family]**.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P24.500

Threats—General

You have found the defendant guilty of the felony of threatening another person with [death; bodily injury].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-60(A)(1).

CASE AUTHORITY:

Holcomb v. Commonwealth, 58 Va. App. 339, 348, 709 S.E.2d 711, 715 (2011); Keyes v. Commonwealth, 39 Va. App. 294, 301–02, 572 S.E.2d 512, 516 (2002); Saunders v. Commonwealth, 31 Va. App. 321, 323–26, 523 S.E.2d 509, 510–11 (2000).

PRACTICE COMMENTARY: The threats proscribed by Va. Code Ann. § 18.2-60(A) include those transmitted by electronic communication producing a visual or electronic message.

The defendant may be prosecuted either in the county, city, or town in which the communication was made or where it was received. Va. Code Ann. § 18.2-60(B).

In *Saunders, 31 Va. App. at 326, 523 S.E.2d at 511*, the Court of Appeals held that the trial court did not err in granting this instruction, and refusing a contrary instruction proffered by the defendant which required the Commonwealth to prove that the defendant acted with malice, declining to imply both *mens rea* and malice as elements of the crime proscribed in Va. Code Ann. § 18.2-60(A).

The posting of threats on a member's profile page within a social media application is an electronically transmitted communication under Va. Code Ann. § 18.2-60(A)(1). *Holcomb, 58 Va. App. at 348, 709 S.E.2d at 715.*

In the criminal context, the "threat" contemplated by Va. Code Ann. § 18.2-60 means "an avowed present determination or intent to injure presently or in the future" and refers to "a communication avowing an intent to injure another's person or property." *Keyes, 39 Va. App. at 301, 572 S.E.2d at 516.* The communication, taken in its particular context, must reasonably cause the receiver to believe that the speaker will act according to his expression of intent. *Id.* The threat is complete once it leaves the defendant's control. *Id.*

Threats of physical harm need not be directly expressed but may be contained in "veiled statements" nonetheless implying injury to the recipient when viewed in all the surrounding circumstances. *Keyes, 39 Va. App. at 301–02, 572 S.E.2d at 516.*

Va. Code Ann. § 18.2-460 prohibits obstructing justice by threats or force. See Instruction No. 35.100 and Instruction No. 35.300.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Extortion and Threats" and "Stalking"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 6.4,

19.1–19.4

MICHIE'S JURISPRUDENCE, Assault & Battery § 5; Extortion § 1; and Words & Phrases, "Extort" and "Threat"

Instruction No. 24.600

Threats on School Grounds, on School Buses, or at School-Sponsored Events

The defendant is charged with the crime of threatening [death; bodily injury] **to** [a person; persons] [on school grounds; at a school-sponsored event; on a school bus]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant knowingly communicated** [in writing; by an electronically transmitted communication producing a visual or electronic message] **to** (name recipient)**; and**

(2) **That the** [written communication; electronically transmitted communication producing a visual or electronic message] **contained a threat to** [kill; do bodily harm to (name recipient)]**; and**

(3) **That the threatened action was to take place** [on the grounds or premises of [an elementary; a middle; a secondary] school; on a school bus; at [an elementary; a middle; a secondary] school event]**; and**

(4) **That the threat to** [kill; do bodily harm] [placed (name recipient) in reasonable apprehension of death or bodily harm; would place the person who is the object of the threat in reasonable apprehension of bodily harm if received] **regardless of whether that person actually received the threat.**

If you find that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

elements of that crime:

(1) That the threatened action was to take place [on the grounds or premises of [an elementary; a middle; a secondary] school; on a school bus; at [an

(4) That the threat to [kill; do bodily harm] [placed (name recipient) in reasonable apprehension of death or bodily harm; would place the person who is the object of the threat in reasonable apprehension of bodily harm if received] [regardless of whether that person actually received the threat.

If you find that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. [If you find [insert lesser included offense] and

further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime charged, then you shall find the defendant not guilty.

Instruction No. P24.600

Threats on School Grounds, on School Buses, or at School-Sponsored Events

You have found the defendant guilty of the felony of threatening [death; bodily harm] [on school grounds; on a school bus; at a school-sponsored event]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-60(A)(2).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The defendant may be prosecuted either in the county, city, or town in which the communication was made or where it was received. Va. Code Ann. § 18.2-60(C). Oral threats against school employees constitute a Class 1 misdemeanor. Va. Code Ann. § 18.2-60(B).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 6.4, 19.1–19.4

MICHIE'S JURISPRUDENCE, Assault & Battery § 5; and Words & Phrases, "Threat"

Instruction No. 24.700

Threats to Intimidate the Population at Large

The defendant is charged with the crime of threatening to intimidate the population at large. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant knowingly communicated in writing** [by an electronically transmitted communication producing a visual or electronic message] **to** (name recipient)**; and**

(2) **That the** [written communication; electronically transmitted communication producing a visual or electronic message] **contained a threat to kill or do bodily serious injury to another; and**

(3) **That the defendant made such threat with the intent to** [intimidate a civilian population at large; influence the conduct or activities of [the government of the United States; a state; a locality] through intimidation; compel the emergency evacuation, or avoidance, of [any place of assembly; any building; any structure; any means of mass transportation]]**.**

(4) **That the defendant was 18 years of age or older at the time the alleged communication(s) was/were made.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you]**.**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

bodily serious injury to another; and

communication(s) was/were made.

guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

defendant not guilty.

Instruction No. P24.700

Threats to Intimidate the Population at Large

You have found the defendant guilty of the felony of threatening to intimidate the population at large.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) **A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or**

(2) **Confinement in jail for a specific time, but not more than twelve (12) months; or**

(3) **A fine of a specific amount, but not more than $2,500; or**

(4) **Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-60(A)(3).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The defendant may be prosecuted either in the county, city, or town in which the communication was made or where it was received. Va. Code Ann. § 18.2-60(C).

A defendant convicted under this statute who is under the age of 18 shall be guilty of a Class 1 misdemeanor, not a felony. If a defendant is under the age of 18, appropriate changes should be made to these instructions. Va. Code Ann. § 18.2-60(A)(3).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Extortion and Threats"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 6.4, 19.1–19.4

MICHIE'S JURISPRUDENCE, Assault & Battery § 5; and Words & Phrases, "Threat"

CHAPTER 25

[RESERVED]

CHAPTER 26

FALSE AND FRAUDULENT ACTS—MISCELLANEOUS

Scope Note

Instruction No. 26.100 Calling or Summoning Emergency Medical Services Vehicle or Firefighting Apparatus Without Just Cause

Instruction No. P26.100 Calling or Summoning Emergency Medical Services Vehicle or Firefighting Apparatus Without Just Cause

Instruction No. 26.200 Failure to Perform Promise to Deliver Crop

Instruction No. P26.200 Failure to Perform Promise to Deliver Crop

Instruction No. 26.250 Failure to Perform Promise for Construction, Etc.

Instruction No. P26.250 Failure to Perform Promise for Construction, Etc.

Instruction No. 26.260 Defrauding Hotels, Restaurants, Etc.

Instruction No. P26.260 Defrauding Hotels, Restaurants, Etc.

Instruction No. 26.270 Fraudulent Conversion or Removal of Leased Personal Property

Instruction No. P26.270 Fraudulent Conversion or Removal of Leased Personal Property

Instruction No. 26.280 Evidence of Intent to Defraud

Instruction No. 26.300 Governmental Fraud—Misrepresentation

Instruction No. P26.300 Governmental Fraud—Misrepresentation

Instruction No. 26.400 Filing False Lien or Encumbrance Against Another

Instruction No. P26.400 Filing False Lien or Encumbrance Against Another

Instruction No. 26.500 Money Laundering—Financial Transaction

Instruction No. P26.500 Money Laundering—Financial Transaction

Instruction No. 26.600 Financial Transaction—Definition

Instruction No. 26.700 Money Laundering—Conversion of Cash Into Negotiable Instruments or Electronic Funds

Instruction No. P26.700 Money Laundering—Conversion of Cash Into Negotiable Instruments or Electronic Funds

SCOPE NOTE

Article 7 of Chapter 6 of Title 18.2 of the Code of Virginia includes a number of "miscellaneous" false and fraudulent acts. Because the individual statutes proscribing those acts are quite specific in setting forth the elements of each offense, and because of the rare incidence of reported decisions regarding those offenses, the Model Jury Instruction Committee decided that it was unnecessary to supply instructions for most of them.

Instructions have been provided for more frequently occurring offenses, namely, calling or summoning an emergency medical services vehicle or firefighting apparatus without just cause (Va. Code Ann. § 18.2-212), which is covered by Instruction No. 26.100; failure to perform a written promise to deliver crops or other property in return for advances (Va. Code Ann. § 18.2-200), which is covered by Instruction No. 26.200; filing a false lien or encumbrance against another (Va. Code Ann. § 18.2-213.2), which is covered by Instruction No. 26.400; failure to perform a promise for construction, etc. (Va. Code Ann. § 18.2-200.1), which is covered by Instruction No. 26.250; defrauding hotels, restaurants, etc. (Va. Code Ann. § 18.2-188) which is covered by Instruction No. 26.260; fraudulent conversion or removal of leased personal property (Va. Code Ann. § 18.2-118) which is covered by Instruction No. 26.270; evidence of intent to defraud (Va. Code Ann. § 18.2-118(B)) which is covered by Instruction No. 26.280.

Instruction No. 26.300 deals with fraud perpetrated upon the Government arising out of commercial dealings and is based on the Virginia Governmental Frauds Act (Article 1.1 of Chapter 12 of Title 18.2).

Article 9 of Chapter 6 of Title 18.2 of the Code of Virginia, the "Virginia Comprehensive Money Laundering Act" (Va. Code Ann. §§ 18.2-246.1–18.2-246.5) was enacted in 1999. To date there have been no reported Virginia decisions interpreting the provisions of the Act.

Instruction No. 26.500 is based on Va. Code Ann. § 18.2-246.3(A), which prohibits conducting a financial transaction knowing that the property involved in the transaction represents the proceeds of a felony.

Instruction No. 26.600 provides the definition of "financial transaction" as set forth in Va. Code Ann § 18.2-246.2.

Instruction No. 26.700 is based on Va. Code Ann. § 18.2-246.3(B), which prohibits converting cash into negotiable instruments or electronic funds for another with knowledge that the cash represents the proceeds of a felony.

Instruction No. 26.100

Calling or Summoning Emergency Medical Services Vehicle or Firefighting Apparatus Without Just Cause

The defendant is charged with the crime of [calling; summoning] [an emergency medical services vehicle; firefighting apparatus] **without just cause. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) **That the defendant** [called; summoned] [an emergency medical services vehicle; firefighting apparatus]**; and**

(2) **That the defendant did not have just cause for** [calling; summoning] **such** [emergency medical services vehicle; firefighting apparatus]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.100

Calling or Summoning Emergency Medical Services Vehicle or Firefighting Apparatus Without Just Cause

You have found the defendant guilty of the crime of [calling; summoning] [an emergency medical services vehicle; firefighting apparatus] **without just cause.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-212.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-212 criminalizes two similar but separate types of conduct—"calling or summoning emergency medical services vehicle or firefighting apparatus without just cause" and "maliciously activating a fire alarm in any building." Instruction No. 26.100 pertains to the first. The instruction may be revised to reflect the elements of the second by substituting the following paragraphs for their similarly numbered counterparts: (1) That the defendant activated a manual or automatic fire alarm in any building; and (2) That the defendant did so maliciously.

The punishment for both offenses is the same.

Whether an emergency services vehicle or firefighting apparatus actually responds is immaterial. Va. Code Ann. § 18.2-212(A).

For a definition of malice, see Instruction No. 37.200.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "False Pretenses and Frauds" & "Interference with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 27.1, 27.9

MICHIE'S JURISPRUDENCE, Obstructing Justice § 2

Instruction No. 26.200

Failure to Perform Promise to Deliver Crop

The defendant is charged with the crime of failure to perform a promise to deliver his [crop; (name other property)] **in return for an advance of** [money; merchandise; (name thing of value)]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) **That the defendant obtained an advance of** [money; merchandise; (name thing of value)] **of the value of $1000 or more from another person by promising in writing to send or deliver his** [crop; (name other property)] **to such person; and**

(2) **That the defendant, with intent to defraud, failed or refused to perform this promise; and**

(3) **That the defendant failed to** [repay; return to] **such person the** [money; merchandise; (name thing of value)] **advanced to him.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.200

Failure to Perform Promise to Deliver Crop

You have found the defendant guilty of the crime of failure to perform a promise to deliver his [crop; (name other property)] **in return for an advance of** [money; merchandise; (name thing of value)]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, for not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-200, 18.2-95, 18.2-96.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: For a somewhat similar offense regarding promises to perform construction, see Va. Code Ann. § 18.2-200.1, Instruction No. 26.250, Failure to Perform Promise for Construction, Etc.

Where the value of the advance is less than $1000, the offense would be petit larceny. See Instruction No. 36.100, Grand Larceny—General for language that should be included when petit larceny is a possible lesser included offense. See Instruction No. 36.200, Petit Larceny—General as an example for use if the defendant is charged with a misdemeanor violation of Va. Code Ann. § 18.2-200. Instruction No. P36.200 should be used if the defendant is found guilty of the misdemeanor offense.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, Commercial Law § 22; Crops §§ 1–3; False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.250

Failure to Perform Promise for Construction, Etc.

The defendant is charged with the crime of failure to perform a promise to [construct; remove; repair; improve] **in return for an advance of** [money; merchandise; (name thing of value)]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) **That the defendant, with intent to defraud, obtained from another person an advance of** [money; merchandise; (name thing of value)] **of the value of $1000 or more upon a promise to perform** [construction; removal; repair; improvement] **of any** [building; structure permanently annexed to real property; other improvements to such real property]**; and**

(2) **That the defendant failed or refused to perform such promise and failed to substantially make good such advance; and**

(3) **That the defendant failed to return the advance within fifteen (15) days of a request to do so sent by certified mail, return receipt requested, to** [his last known address; the address listed in the contract]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.250

Failure to Perform Promise for Construction, Etc.

You have found the defendant guilty of the crime of failure to perform a promise to [construct; remove; repair; improve] **in return for an advance of** [money; merchandise; (name thing of value)]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, for not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-200.1, 18.2-95, 18.2-96.

CASE AUTHORITY:

Bowman v. Commonwealth, 290 Va. 492, 497–501, 777 S.E.2d 851, 855–57 (2015); *Dennos v. Commonwealth, 63 Va. App. 139, 145, 754 S.E.2d 913, 916 (2014)*; *Testerman v. Commonwealth, 57 Va. App. 164, 168–69, 699 S.E.2d 522, 524–25 (2010)*; *Holsapple v. Commonwealth, 266 Va. 593, 601–04, 587 S.E2d 561, 565–67 (2003)*; *Mughrabi v. Commonwealth, 38 Va. App. 538, 548–49, 567 S.E.2d 542, 546–47 (2002)*; *Rader v. Commonwealth, 15 Va. App. 325, 328–29, 423 S.E.2d 207, 209–11 (1992)*; *Jimenez v. Commonwealth, 241 Va. 244, 246–47, 402 S.E.2d 678, 678–79 (1991)*; *Klink v. Commonwealth, 12 Va. App. 815, 818–20, 407 S.E.2d 5, 7–8 (1991)*; *Boothe v. Commonwealth, 4 Va. App. 484, 490–92, 358 S.E.2d 740, 743–45 (1987)*; *Norman v. Commonwealth, 2 Va. App. 518, 519–22, 346 S.E.2d 44, 45–46 (1986)*.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-200.1 also applies to "any other improvements to such real property, including horticulture, nursery or forest products."

Va. Code Ann. § 18.2-200.1 requires that the money be advanced upon a promise to perform construction or improvement involving real property. The advance of money may be for materials or labor, provided the advance is paid as a result of, or because of, a promise to perform construction. *Testerman, 57 Va. App. at 168, 699 S.E.2d at 524–25.*

Where the value of the advance is less than $1000, the offense would be petit larceny. See Instruction No. 36.100, Grand Larceny—General for language that should be included when petit larceny is a possible lesser included offense. See Instruction No. 36.200, Petit Larceny—General as an example for use if the defendant is charged with a misdemeanor violation of Va. Code Ann. § 18.2-200.1. Instruction No. P36.200 should be used if the defendant is found guilty of the misdemeanor offense.

Failure to return the advance upon demand and failure to perform the contract, standing alone, is not sufficient to convict. *Klink, 12 Va. App. at 819, 407 S.E.2d at 8* (noting that there was no evidence of any false statement made to induce the homeowner to enter into the contract). The evidence must establish that the fraudulent intent existed at the time the advance was obtained. *Dennos, 63 Va. App. at 145, 754 S.E.2d at 916*; *Klink, 12 Va. App. at 819, 407 S.E.2d at 7*; see also *Rader, 15 Va. App at 329, 423 S.E.2d at 211* (holding that the time for determining fraudulent intent is the time at which defendant procures the advance, not the time the parties enter into the contract).

In construction fraud cases, as in all other fraud cases, fraudulent intent can be inferred from the conduct and representations of the defendant. Circumstances implying fraudulent intent include a contractor's false statements, subsequent

failure to perform the work, failure to use the advanced funds to purchase supplies or to hire needed labor, efforts to avoid communications with the homeowner, and refusal to return the advanced funds. See *Dennos, 63 Va. App. at 145–46, 754 S.E.2d at 916*; *Mughrabi, 38 Va. App. at 548–49, 567 S.E.2d at 546*

The Commonwealth need not prove actual receipt of the required notice, only that it was sent certified mail, return receipt requested. See *Holsapple, 266 Va. at 599, 587 S.E.2d at 564–65*. Workmanship that is egregiously defective can constitute a "failure to perform." *Id. at 601–04, 587 S.E.2d at 565–67*.

A second promise to perform in the future is not the equivalent of "substantially mak[ing] good such advance." *Norman, 2 Va. App. at 522, 346 S.E.2d at 46*.

The single-larceny doctrine may apply in the context of a construction fraud case arising under Va. Code Ann. § 18.2-200.1. See *Dennos, 63 Va. App. at 146–49, 754 S.E.2d at 917–18*.

ALERTS:

• Virginia Code Ann. § 18.2-200.1 "requires proof that the certified letter to the contractor made an unqualified demand for the return of the advance." *Bowman, 290 Va. at 501, 777 S.E.2d at 857*. No other demand will satisfy the statute. "The statute does not say that the notice can give the contractor other options-such as continued contractual performance at a reduced price, the return of something other than the advance, or the delivery of materials in lieu of the advance." *Id. at 498–99, 777 S.E.2d at 856*.

• For an instruction found to be deficient because it was lacking essential elements, see *Jimenez, 241 Va. at 247, 251, 402 S.E.2d at 679, 681*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, Commercial Law § 22; False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.260

Defrauding Hotels, Restaurants, Etc.

The defendant is charged with the crime of felony defrauding the owner or keeper of a [hotel; motel; campground; boarding house; restaurant; eating establishment]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) That the defendant, without paying, and with intent to cheat or defraud the owner or keeper, did stay at a [hotel; motel; campground, boarding-house]**; obtained food from a** [restaurant; eating house]**; gained entrance to an** [amusement park]**.**

[OR]

(1) That the defendant, with intent to cheat or defraud, and without having an express agreement for credit did procure [food, entertainment, accommodation] **from any** [hotel; motel; campground, boarding house; restaurant; eating house]**.**

[OR]

(1) That the defendant with intent to cheat or defraud the owner or keeper out of pay obtain credit at a [hotel; motel; campground; boarding house; restaurant; eating house] **for food, entertainment or accommodation by any means of any false show of baggage or effects brought thereto.**

[OR]

(1) That the defendant, with intent to cheat or defraud, did obtain credit at a [hotel; motel; campground; boardinghouse; restaurant; eating house; amusement park] **for food, entertainment, or accommodation through any misrepresentation or false statement.**

[OR]

(1) That the defendant, with intent to cheat or defraud, did [remove; cause to be removed] **any baggage or effects from a** [hotel; motel; campground, boardinghouse, restaurant; eating house] **while there was a lien existing thereon for the proper charges due from him for fare and/or board furnished.**

AND

(2) The value of the service, credit or benefit procured or obtained was $1000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of felony defrauding [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has proved beyond a reasonable doubt

element (1) of the elements of the crime, but has failed to prove beyond a reasonable doubt that the value of the service, credit, or benefit procured or obtained is $1000 or more, you shall convict the defendant of misdemeanor defrauding [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt element (1) of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.260

Defrauding Hotels, Restaurants, Etc.

You have found the defendant guilty of the crime of [defrauding a hotel, etc.; obtaining food from a restaurant]; **gaining entrance to an amusement park; procuring food, etc. without express agreement for credit; obtaining credit at hotel, etc. by means of false show of baggage or effects; remove any baggage from a hotel, etc. (while subject to a lien) with intent to cheat or defraud.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, for not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-188.

CASE AUTHORITY:

Smith v. Commonwealth, 72 Va. App. 523, 538, 850 S.E.2d 381, (2020); *Caldwell v. Commonwealth, 298 Va. 517, 522, 840 S.E.2d, 343 (2020)*; *Blankenship v. Commonwealth, 71 Va. App. 608, 619 838 S.E.2d 568 (2020).*

PRACTICE COMMENTARY: Where the value of the advance is less than $1000, the offense would be petit larceny. See Instruction Petit Larceny—General as an example for use if the defendant is charged with a misdemeanor violation of Va. Code Ann. § 18.2-188. Instruction No. P36.200 should be used if the defendant is found guilty of the misdemeanor offense.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.270

Fraudulent Conversion or Removal of Leased Personal Property

The defendant is charged with the crime of felony fraudulent [conversion; removal] **of leased personal property. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) The defendant was in possession or control of the personal property by virtue of or subject to a written lease of such property; and

(2) the defendant, with intent to defraud, did [sell; secrete; destroy; dispose of for his own use; remove from the Commonwealth without the written consent of the lessor] **the property** [fail to return the property to the lessor within 30 days after expiration of the lease or rental period]**.**

(3) The value of the property was $1000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has proved beyond a reasonable doubt element (1) and (2) above, but has not proved the value of the property to be $1000 or more, then you shall find the defendant guilty of misdemeanor fraudulent [conversion; removal] **[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements (1) and (2) of the crime, then you shall find the defendant not guilty.

reasonable doubt each of the following elements of the crime

virtue of or subject to a written lease of such property; and

(3) The value of the property was $1000 or more.

Instruction No. P26.270

Fraudulent Conversion or Removal of Leased Personal Property

You have found the defendant guilty of the crime of fraudulent [conversion; removal] **of leased property.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, for not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a find of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-118, 18.2-95, 18.2-96.

Case Authority:

Sarka v. Commonwealth, 73 Va. App. 56, 854 S.E.2d 204 (2021); *Commonwealth v. McNeal, 282 Va. 16, 710 S.E.2d 733 (2011).*

Practice Commentary: Where the value of the advance is less than $1000, the offense would be petit larceny. See Instruction No. 36.200, Petit Larceny—General as an example for use if the defendant is charged with a misdemeanor violation of Va. Code Ann. § 18.2-118. Instruction No. P36.200 should be used if the defendant is found guilty of the misdemeanor offense.

Alerts:

• Property described in Va. Code Ann. § 18.2-117 or in the Virginia Lease-Purchase Agreement Act (Va. Code Ann. § 59.1-207.17 et. seq.) is excepted and is not subject to the provisions of this statute.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Embezzlement and Related Crimes" and False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure

Michie's Jurisprudence, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.280

Evidence of Intent to Defraud

You may consider as evidence of an intent to defraud the fact that the defendant signed the lease or rental agreement with a name other than his own, or failed to return such property to the person or business he leased it from within 30 days after the giving of written notice to the defendant that the lease or rental period for the property had expired.

Notice mailed by certified mail and addressed to the defendant at the address the defendant stated in the lease shall be sufficient giving of written notice.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-118(B).

CASE AUTHORITY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.300

Governmental Fraud—Misrepresentation

The defendant is charged with the crime of defrauding the government. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) **That the defendant knowingly** [falsified; concealed; misled; covered up by a trick, scheme or device] **a material fact; and**

(2) **That he did so in a commercial dealing with** [any department or agency of the Commonwealth of Virginia; any local government within the Commonwealth of Virginia or any department or agency thereof)].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 28.200.

Governmental Fraud—Misrepresentation

The defendant is also put with the crime of defrauding the government. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That he defrauded [name] [a trick, scheme or device] a material fact; and

(2) That he did so in a manner affecting [name of government] the Commonwealth of Virginia, [by [name of agency] the Commonwealth of Virginia or any department or agency thereof];

shall find the defendant guilty. [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt [either] each [of these] [any] [of the following] elements [of the crime] [you shall find the defendant not guilty].

Instruction No. P26.300

Governmental Fraud—Misrepresentation

You have found the defendant guilty of the crime of defrauding the government.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-498.3.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-498.3 also makes it a crime to make any false, fictitious or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

The following definitions, taken from Va. Code Ann. § 18.2-498.2, may be used as instructions, if necessary: "person" includes any natural person, any trust or association of persons, formal or otherwise, or any corporation, partnership, company or other legal or commercial entity; "commercial dealing" means "any offer, acceptance, agreement, or solicitation to sell or offer to sell or distribute goods, services or construction, to the Commonwealth of Virginia, or any local government within the Commonwealth or any department or agency thereof."

The Attorney General on behalf of the Commonwealth, or the Commonwealth's attorney, on behalf of the county or city as the case may be, may institute actions and proceedings for any and all violations occurring within their jurisdiction. Va. Code Ann. § 18.2-498.5.

For specific offenses arising out of fraud and willful misstatements respecting certification or obtaining moneys as a minority business enterprise, see Va. Code Ann. § 18.2-213.1.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.3

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.400

Filing False Lien or Encumbrance Against Another

The defendant is charged with the crime of filing a false [lien; encumbrance] **against another. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) That the defendant maliciously filed a [lien; encumbrance] **in a public record against the** [real; personal] **property of another; and**

(2) That the defendant knew that such [lien; encumbrance] **was false.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.400

Filing False Lien or Encumbrance Against Another

You have found the defendant guilty of the crime of filing a false [lien; encumbrance] **against another.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-213.2.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-213.2 states that the court in its conviction order or in a separate order shall direct the clerk of any jurisdiction in which a false lien or encumbrance has been filed to release from the record such lien or encumbrance specifically described in the conviction or separate order, including any notice or memorandum of lien. The statute also provides that any such lien or encumbrance shall be deemed invalid and shall be treated as if it was never filed.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.3

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 26.500

Money Laundering—Financial Transaction

The defendant is charged with the crime of money laundering. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant knowingly conducted a financial transaction; and

(2) That the defendant knew that the property involved in the transaction represented the proceeds of (name of felony under the laws of the Commonwealth, another state or territory of the United States, the District of Columbia, or the United States)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.500

Money Laundering—Financial Transaction

You have found the defendant guilty of the crime of money laundering.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not more than forty (40) years; or

(2) A fine of a specific amount, but not more than $500,000; or

(3) A specific term of imprisonment but not more than forty (40) years, and a fine of a specific amount but not more than $500,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-246.3(A).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The definition of financial transaction contained in Instruction No. 26.600 should be used with this instruction.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Money Laundering"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.7, 27.6

MICHIE'S JURISPRUDENCE, Fraudulent and Voluntary Conveyances § 4; and Penalties and Forfeitures § 4

Instruction No. 26.600

Financial Transaction—Definition

"Financial transaction" means any purchase, sale, trade, loan, pledge, investment, gift, transfer, transmission, transportation, delivery, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, purchase or sale of monetary instruments, use of a safe-deposit box, or any other acquisition or disposition of monetary instruments by any means including the movement of funds by wire or other electronic means, which is knowingly designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property involved in the transaction.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-246.2.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: This definition should be used with Instruction No. 26.500, Money Laundering—Financial Transaction.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Money Laundering"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.7, 27.6

MICHIE'S JURISPRUDENCE, Fraudulent and Voluntary Conveyances § 4; and Penalties and Forfeitures § 4

Instruction No. 26.700

Money Laundering—Conversion of Cash Into Negotiable Instruments or Electronic Funds

The defendant is charged with the crime of money laundering. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) **That the defendant converted cash into** [negotiable instruments; electronic funds] **for another; and**

(2) **That the defendant knew that the cash was proceeds of some form of activity that is punishable as the felony of** (name of felony under the laws of the Commonwealth, another state or territory of the United States, the District of Columbia, or the United States)**; and**

(3) **That the defendant converted the cash for compensation.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty].

The defendant is charged with the crime of money laundering. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) [illegible]

(2) [illegible]

(3) That the Defendant committed the act for [illegible].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P26.700

Money Laundering—Conversion of Cash Into Negotiable Instruments or Electronic Funds

You have found the defendant guilty of the crime of money laundering.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-246.3(B)

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Any second or subsequent violation of Va. Code Ann. § 18.2-246.3(B) is punishable as a Class 6 Felony. The paragraphs numbered (1)–(4) from Instruction No. P26.300, Governmental Fraud—Misrepresentation, should be substituted for paragraphs numbered (1)–(3) above for use as a punishment instruction in such cases.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Money Laundering"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.7, 27.6

MICHIE'S JURISPRUDENCE, Fraudulent and Voluntary Conveyances § 4; and Penalties and Forfeitures § 4

CHAPTER 27

FALSE PRETENSES

Scope Note

Instruction No. 27.100 Obtaining Signature by False Pretense

Instruction No. P27.100 Obtaining Signature by False Pretense

Instruction No. 27.150 Obtaining Money or Property by False Pretense

Instruction No. P27.150(a) Obtaining Money or Property by False Pretense (Felony)

Instruction No. P27.150(b) Obtaining Money or Property by False Pretense (Misdemeanor)

Instruction No. 27.200 Obtaining or Attempting to Obtain Drug By Using False Name

Instruction No. P27.200 Obtaining or Attempting to Obtain Drug By Using False Name

Instruction No. 27.300 Promises or Statements of Intention—Definition

Instruction No. 27.500 Identity Theft

Instruction No. P27.500(a) Identity Theft (Felony)

Instruction No. P27.500(b) Identity Theft (Misdemeanor)

SCOPE NOTE

These instructions deal with the principal offenses that relate to the crime known as false pretenses, which is very similar to larceny. *Wileman v. Commonwealth, 24 Va. App. 642, 653–54, 484 S.E.2d 621, 626–27 (1997).* Indeed, Va. Code Ann. § 18.2-178(A) provides that the crime of obtaining money or property by false pretenses is larceny.

Instruction No. 27.100 and Instruction No. 27.150 are based on Va. Code Ann. § 18.2-178. Instruction No. 27.100 is limited to cases where the defendant is charged with obtaining a signature by false pretense. Instruction No. 27.150 deals with obtaining money, property, etc. by false pretense.

Instruction No. 27.200 is based on Va. Code Ann. § 18.2-258.1 relating to obtaining or attempting to obtain any drug while using a false name or the giving of a false address. Instruction No. 27.300 is based solely on case law and defines promises or statements of intention. Instruction No. 27.500 deals with identity theft.

Any person who uses a computer or computer network without authority and: (1) obtains property or services by false pretenses; (2) embezzles or commits larceny; or (3) converts the property of another; is guilty of computer fraud. Va. Code Ann. § 18.2-152.3. See Instruction No. 13.100.

Intent to defraud at the time the false pretenses were made is an essential element of the offense. *Lewis v. Commonwealth, 28 Va. App. 164, 172–73, 503 S.E.2d 222, 225–26 (1998).*

In determining whether the intent to defraud existed at the time the act was committed, the conduct and representations of the accused must be examined since intent is a "secret operation of the mind." *Riegert v. Commonwealth, 218 Va. 511, 519, 237 S.E.2d 803, 808 (1997).*

In *Cunningham v. Commonwealth, 219 Va. 399, 401–03, 247 S.E.2d 683, 684–85 (1978)*, the defendant obtained possession of a car from a dealer by failing to reveal that she had stopped payment on a check that had been given to the dealer on the day before the defendant acquired possession. The court held that the defendant's possession was obtained by her failing to reveal that payment on the check had been stopped and that this was sufficient to complete the crime. In *Orr v. Commonwealth, 229 Va. 298, 301–02, 329 S.E.2d 30, 32 (1985)*, the defendant obtained an advance of money for "extras" during the course of a construction contract, but did not pay his subcontractor. The court reversed Orr's conviction because the evidence was insufficient to prove Orr acted with intent to defraud at the time the false pretenses were made. *Id.*; *see also Caldwell v. Commonwealth, 298 Va. 517, 523–525, 840 S.E.2d 343, 347–48 (2020)* (evidence was insufficient to show that defendant had the intent to cheat or defraud the restaurant at the time she obtained possession of the food under Va. Code Ann. § 18.2-188 (2)).

Instruction No. 27.100

Obtaining Signature by False Pretense

The defendant is charged with the crime of obtaining a signature by false pretense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant made a false representation of a past event or existing fact; and

(2) That when the false representation was made the defendant intended to defraud (name of person); **and**

(3) That because of the false representation, (name of person) **signed a writing; and**

(4) That it was to the prejudice of another's right.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find [one or more members of the class] beyond a reasonable doubt [and subject to the defendant's [] defence] that

Instruction No. P27.100

Obtaining Signature by False Pretense

You have found the defendant guilty of the crime of obtaining a signature by false pretense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-178(A).

CASE AUTHORITY:

Lewis v. Commonwealth, 28 Va. App. 164, 167–73, 503 S.E.2d 222, 223–26 (1998); Bray v. Commonwealth, 9 Va. App. 417, 421–25, 388 S.E.2d 837, 838–41 (1990); Bourgeois v. Commonwealth, 217 Va. 268, 272–74, 227 S.E.2d 714, 717–19 (1976); Lewis v. Commonwealth, 120 Va. 875, 876–80, 91 S.E. 174, 174–76 (1917); Anable v. Commonwealth, 65 Va. (24 Gratt.) 563, 565–68 (1873).

PRACTICE COMMENTARY: See the Practice Commentary for Instruction No. 27.150.

☞ ***PRACTICE POINTER:***

For another instruction on obtaining a signature by false pretenses, see Instruction No. 30.200, based on Va. Code Ann. § 18.2-172 ("Forgery, uttering, etc., other writings"), which covers substantially identical acts but provides for a lesser Class 5 felony penalty as compared to the Class 4 penalty of Va. Code Ann. § 18.2-178.

☞ ***PRACTICE POINTER:***

Venue for the trial of any person charged with an offense under Va. Code Ann. § 18.2-178 may be in the county or city in which (i) any act was performed in furtherance of the offense, or (ii) the person charged with the offense resided at the time of the offense. Va. Code Ann. § 18.2-178(B).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 27.150

Obtaining Money or Property by False Pretense

The defendant is charged with the crime of obtaining [money; property; a gift certificate] **by false pretenses. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant made a false representation of a past event or existing fact; and**

(2) **When the false representation was made, the defendant intended to defraud** (name of person)**; and**

(3) **That because of the false representation, the defendant obtained possession** [and title] **of** [money; property; a gift certificate] **from** (name of person)**; and**

(4) **That the** [money; property; gift certificate] **obtained was worth $1000 or more.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has not proved beyond a reasonable doubt that such property was $1000 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of the misdemeanor of larceny by false pretenses, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P27.150(a)

Obtaining Money or Property by False Pretense (Felony)

You have found the defendant guilty of the crime of obtaining money by false pretense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months; and a fine of a specific amount, but not more than $2,500.

Instruction No. P27.150(b)

Obtaining Money or Property by False Pretense (Misdemeanor)

You have found the defendant guilty of the crime of obtaining money by false pretense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months; and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-178

PRINCIPAL CASE AUTHORITY:

Jewel v. Commonwealth, 30 Va. App. 416, 426–29, 517 S.E.2d 264, 269–71 (1999); Davies v. Commonwealth, 15 Va. App. 350, 352–53, 423 S.E.2d 839, 840 (1992).

OTHER RELEVANT DECISIONS:

Holt v. Commonwealth, 66 Va. App. 199, 208–09, 783 S.E.2d 546, 550 (2016); Reid v. Commonwealth, 65 Va. App. 745, 748–53, 781 S.E.2d 373, 375–77 (2016); Austin v. Commonwealth, 60 Va. App. 60, 66–68, 723 S.E.2d 633, 636–37 (2012); Parker v. Commonwealth, 275 Va. 150, 154, 654 S.E.2d 580, 582 (2008); Shropshire v. Commonwealth, 40 Va. App. 34, 39–41, 577 S.E.2d 521, 523–25 (2003); Millard v. Commonwealth, 34 Va. App. 202, 205–08, 539 S.E.2d 84, 85–86 (2000); Lewis v. Commonwealth, 28 Va. App. 164, 167–73, 503 S.E.2d 222, 223–26 (1998); Wynne v. Commonwealth, 18 Va. App. 459, 459–60, 445 S.E.2d 160, 160 (1994); Swinson v. Commonwealth, 16 Va. App. 923, 925, 434 S.E.2d 348, 349 (1993); Grites v. Commonwealth, 9 Va. App. 51, 56–57, 384 S.E.2d 328, 331 (1989); Orr v. Commonwealth, 229 Va. 298, 301, 329 S.E.2d 30, 32 (1985); Quidley v. Commonwealth, 221 Va. 963, 965–66, 275 S.E.2d 622, 624–25 (1981); Mosteller v. Commonwealth, 222 Va. 143, 147–48, 279 S.E.2d 380, 381–82 (1981); Cunningham v. Commonwealth, 219 Va. 399, 401–03, 247 S.E.2d 683, 684–85 (1978); Riegert v. Commonwealth, 218 Va. 511, 518, 237 S.E.2d 803, 807–08 (1977); Bourgeois v. Commonwealth, 217 Va. 268, 272–74, 227 S.E.2d 714, 717–19 (1976).

PRACTICE COMMENTARY: An instruction featuring language similar to the model instruction was held to "clearly state[ ] the elements of larceny by false pretenses" where it provided that "[t]he Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime: 1. That the defendant knowingly and intentionally made a false representation of a past event or an existing fact; and 2. That when the representation was made, the defendant had an intent to defraud the owner or possessor by causing him to part with the possession of and title to his property; and 3. That because of the false representation, the owner or possessor parted with the possession of and title to his property; and 4. That the property taken was worth $ 200.00 or more." *Jewel, 30 Va. App. at 426–29, 517 S.E.2d at 269–71.* See also *Davies, 15 Va. App. at 352–53, 423 S.E.2d at 840* (concluding that an instruction omitting the requirement that the owner or possessor part with the title to his property, as well as the possession thereof, was erroneous).

For a discussion regarding the inclusion or omission of language concerning the passing of title, see the Alerts to this instruction.

For the definition of promises or statements of intention see Instruction No.

27.300 below.

A person obtaining money by false pretenses "shall be deemed guilty of larceny" under this statute. Va. Code Ann. § 18.2-178.

Intent to defraud at the time the false representation was made is an essential element of the offense. *Lewis, 28 Va. App. at 172–73, 503 S.E.2d at 225–26.* The fraudulent intent must exist at the time the false representation was made in order to prompt the victim to part with his property. *Orr, 229 Va. at 301, 329 S.E.2d at 32.* However, intent may be proved by circumstantial evidence, and a trier of fact may draw reasonable inferences from circumstantial evidence to support a finding of intent to defraud. *Austin, 60 Va. App. at 66–67, 723 S.E.2d at 636.*

With regard to cases in which the defendant stops payment after purchase, "it is not necessary . . . that the stop payment occur prior to the defendant's possession of the property in order to find that he had fraudulent intent." *Austin, 60 Va. App. at 68 n.2, 723 S.E.2d at 637 n.2.* In *Austin*, the Court found sufficient circumstantial evidence to support a finding of intent to defraud at the time of purchase where the defendant made purchases with checks on two separate occasions and later put stop-payment orders on the checks without returning the merchandise and without contacting the sellers about the stop-payment orders. *Id. at 66–68, 723 S.E.2d at 636–37.*

The victim of a false pretense need not suffer actual pecuniary loss. The crime is complete when the fraud intended is consummated by obtaining the property sought by means of the false representations. The offense is not purged by ultimate restoration or payment to the victim. *Quidley, 221 Va. at 966, 275 S.E.2d at 625.* The victim of a fraudulent scheme need not be the person to whom the false pretense or misrepresentation was made. *Mosteller, 222 Va. at 148, 279 S.E.2d at 382.*

Larceny by false pretenses, unlike larceny by trick, requires that title or ownership pass to the perpetrator. *Reid v. Commonwealth, 65 Va. App. 745, 749, 781 S.E.2d 373, 375 (2016).* Whether title or ownership of the ostensibly loaned money in *Reid* passed to the defendant turned on whether the money was to benefit the defendant or the victims, and thus whether an agency relationship was created. *Id. at 751, 781 S.E.2d at 377.* Because the money was merely intended to allow the defendant to recover his car, and the only benefit to the victims was repayment with interest, the court affirmed the conviction for larceny by false pretenses. *Id. at 752–53, 781 S.E.2d at 377.*

☞ ***PRACTICE POINTER:***

The "single larceny doctrine" applies to the statutory offense of larceny by false pretense. *Millard, 34 Va. App.at 205–08, 539 S.E.2d at 85–86.*

For a discussion of a claim-of-right defense to the charge of larceny by false pretenses, see *Groves v. Commonwealth, 50 Va. App. 57, 63, 646 S.E.2d 28, 31*

(2007).

ALERTS:

• Although the text of the statute does not require the passage of title to property, the Court of Appeals in *Davies, 15 Va. App. at 352–53, 423 S.E.2d at 840–41*, citing precedent from the Supreme Court, held that it was error, albeit harmless error on the facts of that case, for the trial court to refuse an instruction that provided that the defendant had acquired not only possession of the victim's property, but also title to the victim's property. In numerous cases, however, the Supreme Court has listed the elements of the crime without mentioning the need to establish that title passed from the victim to the person perpetrating the crime. See, e.g., *Parker, 275 Va. at 154, 654 S.E.2d at 582*. Ordinarily, title is not at issue because title to personal property usually passes with the completion of the transaction. See *Reed & McCormick v. Gold, 102 Va. 37, 47, 45 S.E. 868, 871 (1903)*. In the event the passage of title is at issue, as in *Davies*, or in *Baker v. Commonwealth, 225 Va. 192, 194–95, 300 S.E.2d 788, 788–89 (1983)*, reference to title should be included.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 27.200

Obtaining or Attempting to Obtain Drug By Using False Name

The defendant is charged with the crime of [obtaining; attempting to obtain] **a drug by the use of a false name. The Commonwealth must prove beyond a reasonable doubt that the defendant intentionally used a false name** [to obtain; in attempting to obtain] **any drug.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the defendant intentionally used a false name [to obtain; in attempting to obtain] **any drug, then you shall find the defendant not guilty.**

Instruction No. P27.200

Obtaining or Attempting to Obtain Drug By Using False Name

You have found the defendant guilty of the crime of [obtaining; attempting to obtain] **any drug by the use of a false name.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-258.1(A)(iv).

CASE AUTHORITY:

Williams v. Commonwealth, 14 Va. App. 666, 668–70, 418 S.E.2d 346, 347–48 (1992); McCutcheon v. Commonwealth, 224 Va. 30, 33–35, 294 S.E.2d 808, 810–11 (1982).

PRACTICE COMMENTARY: In *McCutcheon, 224 Va. at 34–35, 294 S.E.2d at 811*, the court ruled that when the Commonwealth shows that the accused has used a false name in obtaining or attempting to obtain a drug, a prima facie violation is established. The burden then shifts to the accused to go forward with the evidence showing his motivation to use a false name was innocent.

In *Williams, 14 Va. App. at 668–70, 418 S.E.2d at 347–48*, the Court specified the criteria which the Commonwealth must prove to establish possession of a drug.

This instruction covers only one of the several crimes defined in Va. Code Ann. § 18.2-258.1 and is intended only as a model. See Va. Code Ann. § 54.1-3401 for the statutory definition of drug.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 27.300

Promises or Statements of Intention—Definition

The false pretense must be a representation as to an existing fact or past event. False representations which are promises or statements of intention referring to future events are not grounds for a conviction, even though such a false representation caused [the owner; the person entitled to possession] **to part with his** [money; property]**. But if false representations are made, some of which refer to existing facts or past events, while others refer solely to future events, you may find the defendant guilty if it is shown that any of the representations as to existing facts or past events induced** [the owner; the person entitled to possession] **to part with his** [money; property]**, and provided the Commonwealth has also proved beyond a reasonable doubt the other elements of the crime.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Parker v. Commonwealth, 275 Va. 150, 154, 654 S.E.2d 580, 582 (2008); Lewis v. Commonwealth, 28 Va. App. 164, 171, 503 S.E.2d 222, 225 (1998); Watson v. Commonwealth, 4 Va. App. 450, 452–53, 358 S.E.2d 735, 736 (1987); Riegert v. Commonwealth, 218 Va. 511, 518–19, 237 S.E.2d 803, 807–08 (1977); Hubbard v. Commonwealth, 201 Va. 61, 66–67, 109 S.E.2d 100, 104–05 (1959).

PRACTICE COMMENTARY: The definition presented in the instruction is set out in *Parker, 275 Va. at 154, 654 S.E.2d at 582*: "[T]he false pretense must be a representation as to an existing fact or past event. False representations amounting to mere promises or statements of intention have reference to future events and are not criminal within the statute, even though they induce the party defrauded to part with his property."

Evidence of a difference in value between services and goods provided and the amount paid for them is not evidence of a false representation of a past or existing fact. *Watson, 4 Va. App. at 452, 358 S.E.2d at 736.*

PRACTICE POINTER:

In *Mosteller v. Commonwealth, 222 Va. 143, 148, 279 S.E.2d 380, 382 (1981)*, the court said that the victim of a fraudulent scheme need not be the person to whom the false pretense or misrepresentation is made.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Embezzlement and Related Crimes" and "False Pretenses and Frauds"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.2

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

Instruction No. 27.500

Identity Theft

The defendant is charged with the crime of identity theft. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) **That the defendant, without the authorization or permission of** (insert name of person or persons who are the subject of the identifying information) [obtained, recorded, or accessed identifying information of (insert name of person or persons who are the subject of the identifying information) which was not available to the general public and which would assist in accessing financial resources, obtaining identification documents, or obtaining benefits of (insert name of person or persons who are the subject of the identifying information); obtained money, credit, loans, goods or services through the use of identifying information of (insert name of person or persons who are the subject of the identifying information); obtained identification documents in the name of (insert name of person or persons who are the subject of the identifying information); or obtained, recorded, or accessed identifying information of (insert name of person or persons who are the subject of the identifying information) while impersonating a law-enforcement officer or an official of the government of the Commonwealth]**; and**

(2) **That the defendant acted with the intent to defraud at the time he** [obtained, recorded or accessed such identifying information; obtained such money, credit, loans, goods or services through the use of identifying information; obtained such identification documents; or obtained, recorded, or accessed such identifying information while impersonating a law-enforcement officer or an official of the government of the Commonwealth]**; and**

(3) **That the defendant** [obtained, recorded, or accessed such identifying information; obtained such money, credit, loans, goods or services; obtained such identification documents; or obtained, recorded or accessed such identifying information while impersonating a law-enforcement officer or an official of the government of the Commonwealth] **for his own use or the use of a third person; and**

(4) **That such identity theft resulted in financial loss of $1000 or more.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Note:

If there is no financial loss or if the financial loss is less than $1000, element (4) should be omitted. In that event, the punishment is that of a Class 1 misdemeanor. See Instruction No. P27.500(b).

Instruction No. P27.500(a)

Identity Theft (Felony)

You have found the defendant guilty of the crime of felony identity theft.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months; and a fine of a specific amount, but not more than $2,500.

Instruction No. P27.500(b)

Identity Theft (Misdemeanor)

You have found the defendant guilty of the crime of misdemeanor identity theft.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months; and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-186.3

CASE AUTHORITY:

Taylor v. Commonwealth, 298 Va. 336, 341–42, 837 S.E.2d 674, 677 (2020); Gheorghiu v. Commonwealth, 280 Va. 678, 701 S.E.2d 407 (2010).

PRACTICE COMMENTARY: Identity theft is not a continuing offense. "Obtaining, recording and accessing identifying information are discrete actions that are complete when the information has been obtained, has been recorded or has been accessed. Each time such an act is performed it is a separate discreet offense. . . . [T]he crime of identity theft is complete when any one of these acts occurs in conjunction with the intent to defraud." *Gheorghiu, 280 Va. at 686, 701 S.E.2d at 412.*

Defendant was properly convicted of attempted identity theft when defendant tried to cash a stolen check that bore the victim's name and bank account number with the intent to attempt to obtain money; defendant used the victim's "identifying information," as that term is defined in Va. Code Ann. § 18.2-186.3(C). *Taylor, 298 Va. at 341–42, 837 S.E.2d at 677.*

Venue for identity theft lies in any locality where the person whose identifying information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in such locality. Va. Code Ann. § 18.2-186.3(D). While the identifying information remains stolen as long as the thief possesses the information, the continued possession of the information is not an element of the crime of identity theft. Accordingly, venue would be improper if based solely on the locality where the defendant is found in possession of the identifying information. *Gheorghiu, 280 Va. at 687, 701 S.E.2d at 412.*

☞ ***PRACTICE POINTER:***

Examples of identifying information are set forth in the statute. See Va. Code Ann. § 18.2-186.3(C).

ALERTS:

• If there is no financial loss, or if the financial loss is less than $1,000, a violation of Va. Code Ann. § 18.2-186.3 is a Class 1 misdemeanor. Any second or subsequent conviction is a Class 6 felony regardless of the amount of loss. Any violation of subsection (B) where five or more persons' identifying information has been obtained, recorded or accessed in the same transaction or occurrence shall be punishable as a Class 5 felony. Any violation of subsection (B) where fifty or more persons' identifying information has been obtained, received or accessed in the same transaction or occurrence shall be punishable as a Class 4 felony. Any violation resulting in the arrest and detention of the person whose identification documents or identifying information were used to avoid summons, arrest,

prosecution, or to impede a criminal investigation shall be punishable as a Class 5 felony. Va. Code Ann. § 18.2-186.3(D).

• For a discussion of determining the amount of the financial loss, see *Salazar v. Commonwealth, 66 Va. App. 569, 583–85, 789 S.E.2d 779, 786–87 (2016).*

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Impersonation"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 10.18

MICHIE'S JURISPRUDENCE, False Pretenses and Cheats §§ 1–7; and Fraud and Deceit § 71

CHAPTER 28

FALSE STATEMENTS TO OBTAIN PROPERTY OR CREDIT

Scope Note

Instruction No. 28.100 Using False Statement to Obtain Property or Credit

Instruction No. P28.100 Using False Statement to Obtain Property or Credit

SCOPE NOTE

Va. Code Ann. § 18.2-186(B) provides that using a false written statement to obtain property, a loan, credit, etc. of a value of $1,000 or more is grand larceny. If the value of the benefit is less than $1000, the crime is petit larceny. The statute covers several different offenses and contains variable elements of each offense.

Instruction No. 18.650 deals with the making of a materially false statement on a form consenting to have a firearms dealer obtain a person's criminal history record in violation of Va. Code Ann. § 18.2-308.2:2(K).

The Committee advises attorneys and judges to draft instructions for individual cases by identifying the specific use of the false statement at issue and selecting as elements the provisions of the statute applicable to the facts of the case.

Instruction No. 28.100

Using False Statement to Obtain Property or Credit

The defendant is charged with using a false statement to obtain property or credit. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) **That the defendant knew that a false statement had been made in writing; and**

(2) **That the false statement concerned the financial condition or ability to pay of** [the defendant; any person for whom he was acting; any firm or corporation in which he was interested; any firm or corporation for which he was acting]**; and**

(3) **That the defendant, with the intent to defraud, procured, upon the faith of the false statement, any** [delivery; payment; loan; credit; extension; discount making; acceptance; sale; endorsement] **for** [his own benefit; the benefit of any person for whom he was acting; any firm or corporation in which he was interested; any firm or corporation for which he was acting]**; and**

(4) **That the** [value of the thing; the amount of the loan, credit or benefit] **obtained was $1000 or more.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P28.100

Using False Statement to Obtain Property or Credit

You have found the defendant guilty of the crime of using a false statement to obtain property or credit.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months; and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-186(B)

PRINCIPAL CASE AUTHORITY:

Mueller v. Commonwealth, 15 Va. App. 649, 654–55, 426 S.E.2d 339, 342 (1993).

OTHER RELEVANT DECISIONS:

Marsh v. Commonwealth, 32 Va. App. 669, 677, 530 S.E.2d 425, 429 (2000); *Orr v. Commonwealth, 229 Va. 298, 301, 329 S.E.2d 30, 32 (1985).*

PRACTICE COMMENTARY: Fraudulent intent can be inferred from the conduct and representations of the defendant. *Dennos v. Commonwealth, 63 Va. App. 139, 145, 754 S.E.2d 913, 916 (2014).*

ALERTS:

• Va. Code Ann. § 18.2-186(A) makes it a Class 1 misdemeanor to make a false statement to obtain credit, cash, etc. wherein the transaction was not completed.

• Va. Code Ann. § 18.2-186(B) makes it grand larceny where the transaction is completed and the benefit obtained is $1000 or more, and petit larceny where the benefit is less than $1000. Where the benefit is less than $1000 the elements of the crime and the punishment provision should be altered accordingly. See Instruction No. 36.200.

• *Marsh, 32 Va. App. at 677, 530 S.E.2d at 429*, held that a sale was completed when the defendant took possession of the car even though she still owed $16,879 on the credit portion of the transaction.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "False Pretenses and Frauds" and "Public Assistance Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 12.1–12.3

MICHIE'S JURISPRUDENCE, Fraud and Deceit, §§ 1–71

CHAPTER 29

FAMILY OFFENSES AND CRIMES AGAINST CHILDREN

Scope Note

Instruction No. 29.100 Bigamy—Second Marriage in Virginia

Instruction No. P29.100 Bigamy—Second Marriage in Virginia

Instruction No. 29.120 Bigamy—Second Marriage Outside Virginia

Instruction No. P29.120 Bigamy—Second Marriage Outside Virginia

Instruction No. 29.140 Bigamy—Reasonable Belief in Death of First Spouse

Instruction No. 29.200 Lascivious—Definition

Instruction No. 29.300 Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent

Instruction No. P29.300 Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent

Instruction No. 29.320 Taking Indecent Liberties With Children by Person in Custodial or Supervisory Relationship

Instruction No. P29.320 Taking Indecent Liberties With Children by Person in Custodial or Supervisory Relationship

Instruction No. 29.330 Child Abuse or Neglect—Serious Injury

Instruction No. P29.330 Child Abuse or Neglect—Serious Injury

Instruction No. 29.340 Child Abuse or Neglect—No Serious Injury

Instruction No. P29.340 Child Abuse or Neglect—No Serious Injury

Instruction No. 29.350 Serious Injury—Definition

Instruction No. 29.360 Willful—Definition

Instruction No. 29.370 Child Cruelty or Endangerment

Instruction No. P29.370 Child Cruelty or Endangerment

Instruction No. 29.380 Criminal Negligence

Instruction No. 29.400 Production, etc., of Child Pornography

Instruction No. P29.400 Production, etc., of Child Pornography

Instruction No. 29.410 Possession of Child Pornography

Instruction No. P29.410 Possession of Child Pornography

Instruction No. 29.420 Distribution, etc., of Child Pornography

Instruction No. P29.420 Distribution, etc., of Child Pornography

Instruction No. 29.430 Definition of Child Pornography
Instruction No. 29.440 Definition of Sexually Explicit Visual Material
Instruction No. 29.445 Definition of Nudity
Instruction No. 29.446 Definition of Sexual Conduct
Instruction No. 29.447 Definition of Sexual Excitement
Instruction No. 29.448 Definition of Sadomasochistic Abuse
Instruction No. 29.450 Use of Computer, etc. For Purposes of Solicitation of Minor
Instruction No. P29.450 Use of Computer, etc. For Purposes of Solicitation of Minor
Instruction No. 29.500 Contributing to Delinquency of Minor
Instruction No. P29.500 Contributing to Delinquency of Minor

SCOPE NOTE

These instructions relate to family offenses and offenses against children. Other instructions may be found in Chapters 4 (Abduction), 22 (Drugs), 39 (Nonsupport), 44 (Rape), and 48 (Sexual Offenses).

Instruction Nos. 29.100, 29.120 and 29.140 relate to bigamy. Instruction No. 29.100 is to be used when the second marriage takes place in Virginia, and Instruction No. 29.120 is to be used when the second marriage takes place outside of Virginia, but the defendant and his second spouse subsequently cohabit in Virginia. Both are based on Va. Code Ann. § 18.2-362; as stated in *Farewell v. Commonwealth, 167 Va. 475, 479, 189 S.E. 321, 323 (1937)*:

> In order to prevent [bigamy] . . . [the statute] provides the same measure of punishment where the second marriage takes place out of this State, and the bigamous person cohabits in this State with the second consort, that it does when the second marriage takes place within this State.

Instruction No. 29.140 is based on Va. Code Ann. § 18.2-364 and relates to one of the available defenses to bigamy: reasonable belief in the death of the first spouse. Other defenses available under Va. Code Ann. § 18.2-364 (divorce prior to second marriage, void first marriage, and seven-year absence of spouse not known to be living) usually do not present jury questions, and thus instructions do not appear for them.

Instruction Nos. 29.200, 29.300 and 29.320 relate to taking indecent liberties with children. Instruction No. 29.300 covers one offense within the indecent liberties statute, Va. Code Ann. § 18.2-370: indecent exposure with lascivious intent. It is intended to serve as a model in drawing instructions for other offenses under Va. Code Ann. § 18.2-370: *viz.*, suggesting to a child that he fondle the sexual or genital parts of defendant; suggesting sexual intercourse or crimes against nature to a child; and persuading or encouraging a child to enter a vehicle, room, house or other place for the purpose of any of the preceding offenses. Instruction No. 29.320, based on § 18.2-370.1, covers taking indecent liberties with children by a person in a custodial or supervisory relationship. All offenses under Va. Code Ann. §§ 18.2-370 and 18.2-370.1 require lascivious intent. Instruction No. 29.200 defines "lascivious" and should be given in conjunction with Instruction Nos. 29.300 and 29.320.

Instruction No. 29.400 is based on Va. Code Ann. § 18.2-374.1, which makes it a Class 5 felony to entice or solicit a person under the age of 18 years to appear in child pornography.

Instruction No. 29.410 relates to possession of child pornography. The following instructions contain definitions related to possession of child pornography: Instruction No. 29.430 (definition of child pornography); Instruction No. 29.440 (definition of sexually explicit visual material); Instruction No. 29.445 (definition of nudity); Instruction No. 29.446 (definition of sexual conduct); Instruction No. 29.447 (definition of sexual excitement); and Instruction No. 29.448 (definition of sadomasochistic abuse). Additionally, Instruction No. 29.420 relates to distribution of child pornography.

Instruction No. 29.500, Contributing to the Delinquency of a Minor, is based on Va. Code Ann. § 18.2-371.

Instructions do not appear for infrequent prosecutions such as incest (Va. Code Ann. § 18.2-366) and placing or leaving a spouse for prostitution (Va. Code Ann. § 18.2-368).

Instruction No. 29.330 is based on Va. Code Ann. § 18.2-371.1(A), which makes it a Class 4

felony for a parent, guardian, or other person responsible for the care of a child, to cause or permit serious injury to the life or health of the child by willful act of omission or refusal to provide any necessary care for the child's health. Instruction No. 29.340 is based on Va. Code Ann. § 18.2-371.1(B), which makes it a Class 6 felony if the act or omission of a parent, guardian, or other person responsible for the care of a child is so gross, wanton and culpable as to show a reckless disregard for human life, even if no injury results.

Section 18.2-371.1 offenses require willfulness; Instruction No. 29.360 defines "willful" and should be given in conjunction with Instruction Nos. 29.330 and 29.340. See *Barrett v. Commonwealth, 32 Va. App. 693, 698–99, 530 S.E.2d 437, 439–40 (2000), subsequent appeal on other grounds at Barrett v. Commonwealth, 41 Va. App. 377, 585 S.E.2d 355 (2003), aff'd on other grounds, Barrett v. Commonwealth, 268 Va. 170, 183–85, 597 S.E.2d 104, 110–12 (2004)* (discussing willfulness).

Va. Code Ann. § 18.2-369 proscribes abuse or neglect of an incapacitated adult. If instructions are needed for this offense, they can be modeled on Instruction Nos. 29.330 and 29.340. See *Wagoner v. Commonwealth, 63 Va. App. 229, 257–58, 756 S.E.2d 165, 179–80 (2014)*; *Correll v. Commonwealth, 269 Va. 3, 13–14, 607 S.E.2d 119, 124–25 (2005).*

Instruction No. 29.100

Bigamy—Second Marriage in Virginia

The defendant is charged with the crime of bigamy. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant entered into a marriage with** (name of second spouse) **in Virginia; and**

(2) **That at the time the defendant was still married to** (name of first spouse) **who was still living.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.100

Bigamy—Second Marriage in Virginia

You have found the defendant guilty of the crime of bigamy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-362.

CASE AUTHORITY:

Cole v. Commonwealth, 58 Va. App. 642, 647–48, 712 S.E.2d 759, 762 (2011); Stuart v. Commonwealth, 11 Va. App. 216, 217–18, 397 S.E.2d 533, 533–34, (1990); Adkins v. Commonwealth, 175 Va. 590, 598, 9 S.E.2d 349, 352 (1940); Oneale v. Commonwealth, 58 Va. (17 Gratt.) 582, 587 (1867).

PRACTICE COMMENTARY: This instruction is based on the elements of bigamy as set forth in Va. Code Ann. § 18.2-362.

In order for the second marriage to constitute bigamy, the first marriage must be a valid marriage, and the first marriage must still exist at the time the defendant entered into the second marriage. *Oneale, 58 Va. (17 Gratt.) at 587.* Where the prior marriage was alleged to have taken place outside Virginia, it must be shown that the marriage was valid where contracted. *Id.*

Even though the second marriage is void under law, it is the act of carrying out the second ceremony of marriage that constitutes bigamy. *Cole, 58 Va. App. at 649, 712 S.E.2d at 762–63.*

☞ ***PRACTICE POINTER:***

An unmarried person who marries another, knowing that the latter is already married, may be convicted of aiding and abetting the commission of bigamy. *Adkins, 175 Va. at 598–99, 9 S.E.2d at 352–53.*

☞ ***PRACTICE POINTER:***

A reasonable belief that one has been divorced is not a defense to a charge of bigamy. *Stuart, 11 Va. App. at 217, 397 S.E.2d at 533.*

ALERTS:

• Instruction No. 29.140 and its Practice Commentary should be consulted for defenses to Va. Code Ann. § 18.2-362.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 5.12

MICHIE'S JURISPRUDENCE, Bigamy §§ 3–4

Instruction No. 29.120

Bigamy—Second Marriage Outside Virginia

The defendant is charged with the crime of bigamy. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant entered into a marriage with** (name of second spouse) **outside of Virginia; and**

(2) **That at the time the defendant was still married to** (name of first spouse) **who was still living; and**

(3) **That the defendant and** (name of second spouse) **after their marriage lived in Virginia as husband and wife.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.120

Bigamy—Second Marriage Outside Virginia

You have found the defendant guilty of the crime of bigamy.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-362, 18.2-363.

CASE AUTHORITY:

Farewell v. Commonwealth, 167 Va. 475, 479, 189 S.E. 321, 323 (1937); *Corvin v. Commonwealth, 131 Va. 649, 657, 108 S.E. 651, 653 (1921).*

PRACTICE COMMENTARY: The crime of bigamy is complete in Virginia when, after an invalid second marriage in another state, there is cohabitation under that second marriage in Virginia. *Farewell, 167 Va. at 479, 189 S.E. at 323*; *Corvin, 131 Va. at 657, 108 S.E. at 653.*

☞ ***PRACTICE POINTER:***

See the Practice Commentary to Instruction No. 29.100 with respect to proof of validity of the first marriage and conviction for aiding and abetting.

ALERTS:

• Instruction No. 29.140 and its Practice Commentary should be consulted for defenses to Va. Code Ann. §§ 18.2-362 and 18.2-363.

RESEARCH REFERENCES:

Ronald J. Bacigal, *Criminal Offenses and Defenses in Virginia*, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 5.12

MICHIE'S JURISPRUDENCE, Bigamy §§ 3–4

Instruction No. 29.140

Bigamy—Reasonable Belief in Death of First Spouse

If you find from the evidence that at the time of the second marriage the defendant reasonably believed (name of first spouse) **was dead, then you shall find the defendant not guilty.**

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-364.

Case Authority:

None.

Practice Commentary: A fraudulently obtained divorce decree, or one obtained in a foreign state by a defendant who did not intend to make that state his domicile, does not bar a prosecution for bigamy. *Corvin v. Commonwealth, 131 Va.* 649, *656–57, 661, 108 S.E. 651, 655 (1921).*

Alerts:

• The instruction is based on only one of the defenses made available in Va. Code Ann. § 18.2-364. The other defenses are: divorce prior to second marriage; voidness of first marriage; and continuous seven-year absence of spouse not known by the defendant to be living.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Family Offenses"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure § 5.12

Michie's Jurisprudence, Bigamy §§ 3–4

Instruction No. 29.200

Lascivious—Definition

Lascivious means a state of mind that is eager for sexual indulgence, desirous of inciting to lust or of inciting sexual desire and appetite.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Dietz v. Commonwealth, 294 Va. 123, 136–37, 804 S.E.2d 309, 315–16 (2017); *Simon v. Commonwealth, 58 Va. App. 194, 204, 708 S.E.2d 245, 250 (2011)*; *Mason v. Commonwealth, 49 Va. App. 39, 44–45, 636 S.E.2d 480, 480–82 (2006)*; *Viney v. Commonwealth, 269 Va. 296, 299–300, 609 S.E.2d 26, 28 (2005)*; *Bloom v. Commonwealth, 34 Va. App. 364, 373, 542 S.E.2d 18, 22 (2001)*; *Moyer v. Commonwealth, 33 Va. App. 8, 28, 531 S.E.2d 580, 590 (2000)*; *Asa v. Commonwealth, 17 Va. App. 714, 718, 441 S.E.2d 26, 29 (1994)*; *Frantz v. Commonwealth, 9 Va. App. 348, 353, 388 S.E.2d 273, 276 (1990)*; *Foster v. Commonwealth, 6 Va. App. 313, 329, 369 S.E.2d 688, 697–98 (1988)*; *Dickerson v. City of Richmond, 2 Va. App. 473, 479, 346 S.E.2d 333, 336 (1986)*; *McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).*

PRACTICE COMMENTARY: Va. Code Ann. §§ 18.2-370 and 18.2-370.1 do not define the word "lascivious." In *McKeon v. Commonwealth*, the Supreme Court of Virginia stated that "lascivious" was to be given its ordinary meaning. *211 Va. at 27, 175 S.E.2d at 284*. The definition used in the instruction is the same as the one given by the Court in *McKeon*. *Id.*

The Court in *McKeon* set forth evidence that may prove lascivious intent, namely: that the defendant was sexually aroused, that the defendant made gestures to himself or the child, that the defendant made improper remarks to the child, or that the defendant asked the child to do anything wrong. *211 Va. at 27, 175 S.E.2d at 284*; see *Viney, 269 Va. at 300, 609 S.E.2d at 28.*

PRACTICE POINTER:

The Supreme Court of Virginia has discussed the sufficiency of circumstantial evidence to prove lascivious intent. See *Dickerson, 2 Va. App. at 477, 346 S.E.2d at 335.*

ALERTS:

• This definition is to be used with Instruction Nos. 29.300 and 29.320 relating to certain acts done with "lascivious intent."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 5.13

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness §§ 9, 11

Instruction No. 29.300

Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent

The defendant is charged with the crime of indecent exposure with lascivious intent to a child. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant:

[(a) knowingly and intentionally exposed his sexual or genital parts to (name of child) who was at the time under the age of fifteen (15); or

(b) knowingly and intentionally proposed that (name of child), who was at the time under the age of 15, expose [his/her] sexual or genital parts to the defendant;]**; and**

(2) That the defendant acted with lascivious intent; and

(3) That the defendant was 18 or older at the time.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.300

Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent

You have found the defendant guilty of the crime of indecent exposure with lascivious intent to a child.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-370(A)(1).

Case Authority:

Ele v. Commonwealth, 70 Va. App. 543, 552–53, 829 S.E.2d 564, 569 (2019); *Blankenship v. Commonwealth, 69 Va. App. 692, 699–703, 823 S.E.2d 1, 4–6 (2019)*; *Hillman v. Commonwealth, 68 Va. App. 585, 592–95, 811 S.E.2d 853, 857–58 (2018)*; *Sandoval v. Commonwealth, 64 Va. App. 398, 415–17, 768 S.E.2d 709, 714–16 (2015)* (applying prior statute); *Farhoumand v. Commonwealth, 288 Va. 338, 342–47, 764 S.E.2d 95, 97–100 (2014)*; *Simon v. Commonwealth, 58 Va. App. 194, 204–10, 708 S.E.2d 245, 250–53 (2011)*; *Mason v. Commonwealth, 49 Va. App. 39, 44–45, 636 S.E.2d 480, 482 (2006); Hix v. Commonwealth, 270 Va. 335, 347, 619 S.E.2d 80, 87 (2005); Viney v. Commonwealth, 269 Va. 296, 299–302, 609 S.E.2d 26, 28–29 (2005); Brooker v. Commonwealth, 41 Va. App. 609, 615–17, 587 S.E.2d 732, 735–36 (2003); Holley v. Commonwealth, 38 Va. App. 158, 163–66, 562 S.E.2d 351, 354–55 (2002); Siquina v. Commonwealth, 28 Va. App. 694, 697–99, 508 S.E.2d 350, 352–53 (1998); Jewell v. Commonwealth, 8 Va. App. 353, 356–57, 382 S.E.2d 259, 262 (1989); Campbell v. Commonwealth, 227 Va. 196, 198–200, 313 S.E.2d 402, 403–04 (1984); Breeding v. Commonwealth, 213 Va. 344, 344–45, 192 S.E.2d 807, 807 (1972); McKeon v. Commonwealth, 211 Va. 24, 25–27, 175 S.E.2d 282, 284–85 (1970).*

Practice Commentary: It is essential that the Commonwealth prove the requisite intent, as well as the act, beyond a reasonable doubt. *McKeon, 211 Va. at 26–27, 175 S.E.2d at 284*. The Supreme Court of Virginia addressed the sufficiency of evidence necessary to prove lascivious intent in *McKeon. 211 Va. at 27, 175 S.E.2d at 284*. See *Breeding, 213 Va. at 344–45, 192 S.E.2d at 807*; *Simon, 58 Va. App. at 206–09, 708 S.E.2d at 251–52*.

Va. Code Ann. § 18.2-370(D) provides for escalated penalties, based on the age of the victim or if the defendant and victim are in certain recognized family relationships. The statute specifies that "[a]ny parent, step-parent, grandparent or step-grandparent who commits a violation of . . . this section . . . (i) upon his child, step-child, grandchild or step-grandchild who is at least 15 but less than 18 years of age is guilty of a Class 5 felony or (ii) upon his child, step-child, grandchild or step-grandchild less than 15 years of age is guilty of a Class 4 felony." For punishment instructions applicable in these circumstances, see Instruction Nos. 54.400 (Class 4 Felony) and 54.500 (Class 5 Felony).

In *Hix*, a defendant was charged with attempted indecent liberties after arranging to meet with an undercover officer who was posing as a 13-year-old girl in Internet chat rooms. *270 Va. at 338–40, 619 S.E.2d at 81–83*. The Supreme Court of Virginia held that the non-existence of a real child did not make the crime legally impossible, but only factually impossible, which was not a defense to a charge of attempted indecent liberties. *Id. at 345, 619 S.E.2d at 85–86*; see *Grafmuller v.*

Commonwealth, 57 Va. App. 58, 63–65, 698 S.E.2d 276, 279–80 (2010).

In *Blankenship v. Commonwealth*, a defendant convicted of charges including indecent liberties argued that the trial court erred in admitting evidence of his prior conviction for indecent liberties. *69 Va. App. at 699–703, 823 S.E.2d at 4–6.* The Court of Appeals of Virginia held that the balancing test in Virginia Rule of Evidence 2:403 applies to evidence of prior convictions sought to be admitted under Va. Code Ann. § 18.2-67.7:1 and Rule of Evidence 2:413, and that the trial court had properly conducted this test. *Id.*

☞ ***PRACTICE POINTER*:**

Va. Code Ann. § 18.2-370(C) provides for enhanced punishment from a Class 5 felony to a Class 4 felony for certain second or subsequent violations of Va. Code Ann. § 18.2-370(A)(1).

☞ ***PRACTICE POINTER*:**

A defendant need not actually be seen by his or her victim as long as he or she is likely to be seen. *Siquina, 28 Va. App. at 698–99, 508 S.E.2d at 352–53*; see *Farhoumand, 288 Va. at 342–47, 764 S.E.2d 95, 97–100* (holding that "exposure" requires a visual display where the genitalia are seen, or where there is a possibility that they could be seen, and finding that the indecent exposure statute does not proscribe conduct where a defendant's genitals are felt but otherwise covered or concealed from view).

☞ ***PRACTICE POINTER*:**

Exposure may occur by means of a computer and a web camera. *Brooker, 41 Va. App. at 616, 587 S.E.2d at 735–36.* Exposure does not require physical presence close to the victim, if the circumstances are such that the defendant's exposure was liable to be seen by others. *Hillman, 68 Va. App. at 596–98, 811 S.E.2d at 859–60* (photos sent via Snapchat to child).

☞ ***PRACTICE POINTER*:**

Buttocks may be "sexual parts." *Moyer v. Commonwealth, 33 Va. App. 8, 34–36, 531 S.E.2d 580, 593–9 (2000).*

☞ ***PRACTICE POINTER*:**

Va. Code Ann. § 18.2-359 details where appropriate venue lies for a violation, or attempted violation, of Va. Code Ann. §§ 18.2-361, 18.2-370, or 18.2-370.1.

ALERTS:

- This instruction relates to one of several offenses in Va. Code Ann. § 18.2-370 and may be used as a model in drafting instructions for other offenses appearing in that section.

- This instruction, and other Va. Code Ann. § 18.2-370 instructions using this as a model, should be used with Instruction No. 29.200 defining "lascivious."

- Va. Code Ann. § 18.2-370 does not apply when the defendant and the child are legally married.

• When the defendant maintains a custodial or supervisory relationship in regard to the child, reference Va. Code Ann. § 18.2-370.1 and Instruction No. 29.320.

• See Instruction No. 29.400 regarding production of child pornography and the sexual assault instructions in Chapter 48.

• Indecent exposure (Va. Code Ann. § 18.2-387) is not a lesser included offense of exposure with lascivious intent under Va. Code Ann. § 18.2-370. *Simon v. Commonwealth, 58 Va. App. 194, 205, 708 S.E.2d 245, 250–51 (2011).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Criag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 5.13

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11

Instruction No. 29.320

Taking Indecent Liberties With Children by Person in Custodial or Supervisory Relationship

The defendant is charged with the crime of taking indecent liberties with a child with whom he maintained a custodial or supervisory relationship. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant, with lascivious intent, knowingly and intentionally** [proposed that the child feel or fondle the sexual or genital parts of the defendant; proposed that the defendant feel or handle the sexual or genital parts of the child; proposed to the child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, anilingus, or any act constituting an offense under Va. Code Ann. § 18.2-361; exposed [his; her] sexual or genital parts to the child; proposed to the child that the child engage in [sexual intercourse; sodomy; fondling of sexual or genital parts with another person]; sexually abused the child by (description of an act defined as sexual abuse in Va. Code § 18.2-67.10(6))]**; and**

(2) **That the child was under the age of 18 at the time; and**

(3) **That the defendant was 18 or older at the time;**

(4) **That the defendant at the time maintained a custodial or supervisory relationship over** (name of child)**; and**

(5) **The defendant at the time was not married to** (name of child)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

(2) That the child was under the age of 18 at the time; and

(3) That the defendant was 18 or older at the time;

(4) That the defendant at the time maintained a custodial or supervisory relationship over (name of child); and

(5) The defendant at the time was not married to (name of child).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [and you shall not fix the punishment from your verdict has been removed and the jury evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.320

Taking Indecent Liberties With Children by Person in Custodial or Supervisory Relationship

You have found the defendant guilty of the crime of taking indecent liberties with a child with whom he maintained a custodial or supervisory relationship.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-370.1.

CASE AUTHORITY:

Hutton v. Commonwealth, 66 Va. App. 714, 720–26, 791 S.E.2d 750, 753–56 (2016); *Phan Le v. Commonwealth, 65 Va. App. 66, 78–79, 774 S.E.2d 475, 481 (2015)*; *Linnon v. Commonwealth, 287 Va. 92, 98–100, 752 S.E.2d 822, 826–27 (2014)*; *Kolesnikoff v. Commonwealth, 54 Va. App. 396, 403–05, 679 S.E.2d 559, 563–64 (2009)*; *Sadler v. Commonwealth, 276 Va. 762, 765–66, 667 S.E.2d 783, 785 (2008)*; *Guda v. Commonwealth, 42 Va. App. 453, 457–61, 592 S.E.2d 748, 750–52 (2004)*; *Krampen v. Commonwealth, 29 Va. App. 163, 166–68, 510 S.E.2d 276, 278–79 (1999)*.

PRACTICE COMMENTARY: It is essential that the Commonwealth prove the defendant's lascivious intent, as well as the act, beyond a reasonable doubt. *McKeon v. Commonwealth, 211 Va. 24, 26–27, 175 S.E.2d 282, 284 (1970)*. The Supreme Court of Virginia addressed the sufficiency of evidence necessary to prove lascivious intent in *McKeon*. See *McKeon, 211 Va. at 27, 175 S.E.2d at 284*; see also *Simon v. Commonwealth, 58 Va. App. 194, 206–09, 708 S.E.2d 245, 251–52 (2011)*.

A victim's testimony alone may be sufficient to support a conviction under Va. Code Ann. § 18.2-370.1 without corroborative evidence of physical contact with the defendant. *Phan Le, 65 Va. App. at 79–78, 774 S.E.2d at 480–81*.

The purpose of Va. Code Ann. § 18.2-370.1 "is to protect minors from adults who might exploit certain types of relationships." *Sadler, 276 Va. at 765, 667 S.E.2d at 785*; see *Hutton, 66 Va. App. at 723, 791 S.E.2d at 754*. "The key question in determining whether a given relationship falls within the statute is whether the defendant 'had the responsibility for and control of the [child's] safety and well-being.'" *Linnon, 287 Va. at 98, 752 S.E.2d at 826 (quoting Krampen, 29 Va. App. at 168, 510 S.E.2d at 278)*; see also *Guda, 42 Va. App. at 459–60, 592 S.E.2d at 750–51* (rejecting the argument that the child must be specifically entrusted to the defendant's care through explicit parental delegation of responsibility).

The statutory term "supervisory" is not defined in Va. Code Ann. § 18.2-370.1 or elsewhere in Title 18.2. *Hutton, 66 Va. App. at 720, 791 S.E.2d at 753*. Thus, in interpreting the term "supervisory" in Va. Code Ann. § 18.2-370.1, the Court of Appeals relied on the dictionary definition of "supervise," which means to "coordinate, direct, and inspect continuously and at first hand the accomplishment of" and "oversee with the powers of direction and decision the implementation of one's own or another's intentions." *Id.* (holding that defendant did not have a "supervisory" relationship with the teenage victim based solely on sexual proposals).

☞ ***PRACTICE POINTER:***

The offensive conduct on which the prosecution is based is not limited to

incidents occurring during the activity on which the relationship is based. *Sadler, 276 Va. at 765, 667 S.E.2d at 785.*

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 18.2-370.1(B) provides for enhanced punishment from a Class 6 felony to a Class 5 felony in certain circumstances.

☞ ***PRACTICE POINTER:***

A defendant need not actually be seen by his or her victim as long as he or she is likely to be seen. *Siquina v. Commonwealth, 28 Va. App. 694, 699, 508 S.E.2d 350, 353 (1998).*

☞ ***PRACTICE POINTER:***

Exposure may occur by means of a computer and a web camera. *Brooker v. Commonwealth, 41 Va. App. 609, 616, 587 S.E.2d 732, 735–36 (2003).*

☞ ***PRACTICE POINTER:***

Buttocks may be "sexual parts." *Moyer v. Commonwealth, 33 Va. App. 8, 34–36, 531 S.E.2d 580, 593–94 (2000).*

☞ ***PRACTICE POINTER:***

Force is not an element of custodial indecent liberties under Va. Code Ann. § 18.2-370.1. *Phan Le, 65 Va. App. at 78–79, 774 S.E.2d at 481.*

! *ALERTS:*

• This instruction relates to one of several offenses in Va. Code Ann. § 18.2-370.1 and may be used as a model in drafting instructions for other offenses appearing in that section.

• This instruction, and other Va. Code Ann. § 18.2-370.1 instructions using this as a model, should be used with Instruction No. 29.200 defining "lascivious."

• See also Instruction No. 29.400 regarding production of obscene items involving children and the sexual assault instructions in Chapter 48.

• Indecent exposure (Va. Code Ann. § 18.2-387) is not a lesser included offense of indecent liberties with children under Va. Code Ann. § 18.2-370, which requires exposure with lascivious intent. *Simon, 58 Va. App. at 204–05, 708 S.E.2d at 250–51.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 5.13

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11

Instruction No. 29.330

Child Abuse or Neglect—Serious Injury

The defendant is charged with the crime of child abuse or neglect resulting in serious injury. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was a parent, guardian, or other person responsible for the care of** (name of victim); **and**

(2) **That the** (name of victim) **was a child under the age of 18; and**

(3) **That the defendant, by willful act, or willful omission, or refusal to provide any necessary care for the health of** (name of victim), **caused or permitted serious injury to the life or health of** (name of victim).

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Child Abuse or Neglect—Serious Injury

Instruction No. P29.330

Child Abuse or Neglect—Serious Injury

You have found the defendant guilty of the crime of child abuse or neglect resulting in serious injury.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-371.1(A).

Case Authority:

White v. Commonwealth, 68 Va. App. 111, 118–26, 804 S.E.2d 317, 320–24 (2017); *Miller v. Commonwealth, 64 Va. App. 527, 537–47, 769 S.E.2d 706, 710–15 (2015)*; *Burnette v. Commonwealth, 60 Va. App. 462, 474–75, 729 S.E.2d 740, 745–46 (2012)*; *Carrington v. Commonwealth, 59 Va. App. 614, 620–22, 721 S.E.2d 815, 817–18 (2012)*; *Whitfield v. Commonwealth, 57 Va. App. 396, 404–07, 702 S.E.2d 590, 594–95 (2010)*; *Barrett v. Commonwealth, 268 Va. 170, 182–86, 597 S.E.2d 104, 110–12 (2004)*; *Mangano v. Commonwealth, 44 Va. App. 210, 213–16, 604 S.E.2d 118, 120–21 (2004)*; *Collado v. Commonwealth, 33 Va. App. 356, 365–67, 533 S.E.2d 625, 630 (2000)*; *Ellis v. Commonwealth, 29 Va. App. 548, 554–56, 513 S.E.2d 453, 456–57 (1999)*.

Practice Commentary: A person may become "responsible for the care of a child" by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility or court order. *Snow v. Commonwealth, 33 Va. App. 766, 772–73, 537 S.E.2d 6, 9–10 (2000)*. The law does not require that a person be the sole adult responsible for the care of a child in order to be convicted of a violation of Va. Code Ann. § 18.2-371.1(A). *Carrington, 59 Va. App. at 621, 721 S.E.2d at 818*.

Va. Code Ann. § 18.2-371.1(C) provides that good faith treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of the statute.

Alerts:

• It is error to fail to instruct the jury on the meaning of the term "willful" as used in Va. Code Ann. § 18.2-371.1. *Barrett v. Commonwealth, 32 Va. App. 693, 698–99, 530 S.E.2d 437, 439–40 (2000)*, *subsequent appeal on other grounds*, *Barrett v. Commonwealth, 41 Va. App. 377, 585 S.E.2d 355 (2003)*, *aff'd on other grounds*, *Barrett v. Commonwealth, 268 Va. 170, 183–85, 597 S.E.2d 104, 110–14 (2004)*. Instruction No. 29.360 defines "willful" for purposes of the child abuse and neglect statute.

• Va. Code Ann. § 18.2-371.1(A) does not impose criminal liability on parents who fail to take positive action to ferret out every potential hazard to ensure the premises are safe. Va. Code Ann. § 18.2-371.1(A) punishes a parent's willful omission, which requires an awareness of danger associated with leaving the child unsupervised. *White, 68 Va. App. at 126, 804 S.E.2d at 324*.

• This instruction should be used with Instruction No. 29.350, defining the term "serious injury."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.340

Child Abuse or Neglect—No Serious Injury

The defendant is charged with the crime of child abuse or neglect. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a parent, guardian, or other person responsible for the care of (name of victim); **and**

(2) That (name of victim) **was a child under the age of 18; and**

(3) That the defendant's willful act or omission in the care of (name of victim), **was so gross, wanton and culpable as to show a reckless disregard for human life.**

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 29.3.09

Child Abuse or Neglect—No Serious Injury

The defendant is charged with the crime of child abuse or neglect. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a parent, guardian, or other person responsible for the care of [name of victim];

(2) That (name of victim) was a child under the age of 18; and

(3) That the defendant [failed to act, or acted in a manner to the detriment of (name of victim)], was so gross, wanton and culpable as to show a reckless disregard for human life.

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.340

Child Abuse or Neglect—No Serious Injury

You have found the defendant guilty of the crime of child abuse or neglect.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-371.1(B).

CASE AUTHORITY:

Camp v. Commonwealth, 68 Va. App. 694, 701–706, 813 S.E.2d 10, 14–16 (2018); Hannon v. Commonwealth, 68 Va. App. 87, 94–99, 803 S.E.2d 355, 358–60 (2017); *Coomer v. Commonwealth, 67 Va. App. 537, 545–51, 797 S.E.2d 787, 791–94 (2017)*; *Whitfield v. Commonwealth, 57 Va. App. 396, 404–07, 702 S.E.2d 590, 594–95 (2010)*; *Wood v. Commonwealth, 57 Va. App. 286, 298–302, 701 S.E.2d 810, 815–18 (2010)*; *Shanklin v. Commonwealth, 53 Va. App. 683, 688-91, 674 S.E.2d 577, 579–81 (2009)*; *Ferguson v. Commonwealth, 51 Va. App. 427, 437–39, 658 S.E.2d 692, 697–98 (2008)*; *Morris v. Commonwealth, 272 Va. 732, 738–39, 636 S.E.2d 436, 439–40 (2006); Jones v. Commonwealth, 272 Va. 692, 698–702, 636 S.E.2d 403, 406–08 (2006); Mangano v. Commonwealth, 44 Va. App. 210, 213–17, 604 S.E.2d 118, 120–22 (2004); Barrett v. Commonwealth, 268 Va. 170, 182–86, 597 S.E.2d 104, 110–12 (2004); Wolfe v. Commonwealth, 42 Va. App. 776, 781–82, 595 S.E.2d 27, 29–30 (2004); Commonwealth v. Duncan, 267 Va. 377, 384–86, 593 S.E.2d 210, 214–15 (2004); Cotton v. Commonwealth, 35 Va. App. 511, 517–18, 546 S.E.2d 241, 244–45 (2001); Snow v. Commonwealth, 33 Va. App. 766, 771–75, 537 S.E.2d 6, 9–11 (2000).*

PRACTICE COMMENTARY: A person may become "responsible for the care of a child" by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility or court order. *Snow, 33 Va. App. at 773, 537 S.E.2d at 10*; see *Lasley v. Hylton, 288 Va. 419, 424–25, 764 S.E.2d 88, 90–91 (2014)* (discussing, in a civil context, a parent's supervisory responsibility of a child).

Va. Code Ann. § 18.2-371.1(C) provides that good faith treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall not, for that reason alone, be considered in violation of the statute.

A speculative possibility of harm alone is not sufficient for conviction. *Coomer, 67 Va. App. at 537, 797 S.E.2d at 794.*

The element of this offense requiring a willful act or omission that is so gross, wanton, and culpable as to demonstrate a reckless disregard for the child's life need not be an act or omission that subjects the child to an actual risk of death, but may be shown by conduct that subjects the child to a substantial risk of serious injury. *Duncan, 267 Va. at 385, 593 S.E.2d at 215*; see also *Jones, 272 Va. at 698, 636 S.E.2d at 406*. Thus, the Commonwealth's evidence must establish by the totality of the circumstances that the defendant's action created the probability of a substantial risk of death or serious injury to the child. *Coomer, 67 Va. App. at 551, 797 S.E.2d at 793–94* (Commonwealth failed to prove the presence of a substantial risk or probability of serious injury or death where defendant mother drove vehicle

while intoxicated with child in car).

When determining a defendant's culpability, courts apply an objective standard and ask if the defendant either know or should have known the probable results of his/her acts. *Whitfield, 57 Va. App. 405–06, 702 S.E.2d at 594.*

Va. Code Ann. § 18.2-369 proscribes abuse or neglect of an incapacitated adult. *Wagoner v. Commonwealth, 63 Va. App. 229, 250–258, 756 S.E.2d 165, 175–180 (2014)*; *Correll v. Commonwealth, 269 Va. 3, 11, 607 S.E.2d 119, 123 (2005).*

☞ ***PRACTICE POINTER:***

Evaluating intent requires examining the act that created the risk and the degree to which the accused was aware of the danger that resulted from the act. A showing of simple negligence is not sufficient to justify the imposition of a criminal penalty, but instead must rise to the level of gross negligence. *Morris, 272 Va. at 739, 630 S.E.2d at 439–40*; see *Bell v. Commonwealth, 170 Va. 597, 612–13, 195 S.E. 675, 681 (1938)* (defining gross negligence as "culpable or criminal when accompanied by acts of commission or omission of a wanton or wil[l]ful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his acts.").

! ***ALERTS:***

• It is error to fail to instruct the jury on the meaning of the term "willful" as used in Va. Code Ann. § 18.2-371.1. *Barrett v. Commonwealth, 32 Va. App. 693, 699, 530 S.E.2d 437, 440 (2000)*; see Instruction No. 29.360.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.350

Serious Injury—Definition

Serious injury shall include, but not be limited to: (i) disfigurement; (ii) a fracture; (iii) a severe burn or laceration; (iv) mutilation; (v) maiming; (vi) forced ingestion of dangerous substances; or (vii) life threatening internal injuries.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-371.1(A)

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Though death is not enumerated as a "serious injury," a grievous injury leading to death may constitute serious injury. See *Cotton v. Commonwealth, 35 Va. App. 511, 518, 546 S.E.2d 241, 245 (2001)* (affirming a conviction of a mother whose son died from shaken baby syndrome and noting that it is the grievous injuries leading to death which constitute the serious injury under Va. Code Ann. 18.2-371.1); see also *Nolen v. Commonwealth, 53 Va. App. 593, 597, 673 S.E.2d 920, 922 (2009)* (finding that the list of injuries in Va. Code Ann. § 18.2-371.1(A) is not exhaustive and "relate[s] to a specific legislative concern, the protection of children in custodial relationships").

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.360

Willful—Definition

A willful act is one done with a bad purpose, or without justifiable excuse, or without ground for believing it is lawful. A willful act is intentional, or knowing, or voluntary, as distinguished from accidental. The terms "bad purpose" or "without justifiable excuse" require knowledge that the particular conduct will likely result in injury or illegality.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-371.1.

CASE AUTHORITY:

White v. Commonwealth, 68 Va. App. 111, 119–26, 804 S.E.2d 317, 321–24 (2017); *Miller v. Commonwealth, 64 Va. App. 527, 543–47, 769 S.E.2d 706, 713–15 (2015)*; *Jones v. Commonwealth, 272 Va. 692, 699, 636 S.E.2d 403, 406 (2006)*; *Barrett v. Commonwealth, 268 Va. 170, 183, 597 S.E.2d 104, 111 (2004)*; *Commonwealth v. Duncan, 267 Va. 377, 384–85, 593 S.E.2d 210, 214–15 (2004)*; *Snow v. Commonwealth, 33 Va. App. 766, 774–75, 537 S.E.2d 6, 10–11 (2000)*; *Collado v. Commonwealth, 33 Va. App. 356, 366, 533 S.E.2d 625, 630 (2000)*; *Ellis v. Commonwealth, 29 Va. App. 548, 554, 513 S.E.2d 453, 456 (1999)*.

PRACTICE COMMENTARY: A finding of willfulness requires that a defendant must have been advertent to the likelihood that the conduct or omission in question would cause some injury. *White, 68 Va. App. at 121, 804 S.E.2d at 321–22*.

In *Miller*, the court quoted Instruction No. 29.360 and analyzed the evidence of willfulness under that given instruction, which it noted became law of the case, as apparently no objection to the instruction was made at trial. *64 Va. App. at 543 n.4, 769 S.E.2d at 713 n.4. Miller* involved a charge of contributing to the delinquency of a minor under Va. Code Ann. § 18.2-371, not child abuse or neglect under Va. Code Ann. § 18.2-371.1(A).

ALERTS:

• It is error to fail to instruct the jury on the meaning of the term "willful" as used in Va. Code Ann. § 18.2-371.1. *Barrett v. Commonwealth, 32 Va. App. 693, 699, 530 S.E.2d 437, 440 (2000)*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Criminal Procedure § 6

Instruction No. 29.370

Child Cruelty or Endangerment

The defendant is charged with the crime of child [cruelty; endangerment]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime.**

(1) That the defendant [employed, had custody] of [name of child], who was a child under the age of 18;

(2) That the defendant willfully or negligently caused or permitted:

(a) the life of such child to be endangered; and/or

(b) the health of such child to be injured; and/or

(c) the child to be beaten or cruelly treated.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged then you shall find the defendant guilty of child cruelty.

If you find that the Commonwealth has failed to prove one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.370

Child Cruelty or Endangerment

You have found the defendant guilty of the crime of Child Cruelty.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500.00; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.00.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 40.1-103(A)

CASE AUTHORITY:

Carosi v. Commonwealth, 280 Va. 545, 554–56, 701 S.E.2d 441, 446–47 (2010); *King v. Commonwealth, 56 Va. App. 133, 137–38, 692 S.E.2d 249, 251–52 (2010)*; *Barnes v. Commonwealth, 47 Va. App. 105, 111, 622 S.E.2d 278, 280–81 (2005)*; *Ellis v. Commonwealth, 29 Va. App. 548, 554–58, 513 S.E.2d 453, 456–58 (1999)*; *Lovisi v. Commonwealth, 212 Va. 848, 849–51, 188 S.E.2d. 206, 208–09 (1972).*

PRACTICE COMMENTARY: Virginia Code Ann. § 40.1-103 prohibits a range of criminal behavior from mere endangerment to actual torture. *Barnes, 47 Va. App. at 111, 622 S.E.2d at 280.* The instruction references prohibited acts most often prosecuted under Va. Code Ann. § 40.1-103, however, the statute also makes it unlawful to willfully or negligently cause or permit a child to be placed in a situation where his morals may be endangered, or to cause the child to be overworked, tortured, tormented, or mutilated. If the case involves one of these situations, the instruction should be amended appropriately to include it.

While enacted and codified as part of the Child Labor Law, Va. Code Ann. § 40.1-103(A), has been classified as a "cruelty to children statute" which extends not only to employers but also to parents and those standing *in loco parentis* who have permanent or temporary custody of children. *Lovisi, 212 Va. at 850, 188 S.E.2d. at 208.* Custody is not limited to persons who have legal custody, i.e. it extends to babysitters and teachers, among others. *Id.*

The statute is written in the disjunctive, allowing for conviction when the defendant is "willful or negligent." Va. Code Ann. § 40.1-103(A). Instruction No. 29.360 defines the term "willful." Instruction No. 29.380 defines criminal negligence. Because willful conduct is different from criminal negligence, *Barnes, 47 Va. App. at 111, 622 S.E.2d at 280–81*, the jury should be instructed on both the term willful and criminal negligence.

Double jeopardy does not preclude a simultaneous conviction for child endangerment under Va. Code Ann. § 40.1-103(A) and for felony child neglect under Va. Code Ann. § 18.2-371.1(A) because each statute contains an element that the other does not. *King, 56 Va. App. at 137–38, 692 S.E.2d at 251–52.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.380

Criminal Negligence

Criminal negligence is a standard that is higher than mere lack of ordinary care. Criminal negligence consists of a reckless or indifferent disregard of human life, under circumstances reasonably calculated to produce serious injury or death, or which make it probable that serious injury or death will occur. To constitute criminal negligence, the Commonwealth must show that the defendant knew or should have known that the probable result of his acts would be a serious injury or death to the child.

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Coomer v. Commonwealth, 67 Va. App. 537, 546–47, 797 S.E.2d 787, 791–92, (2017); *Carosi v. Commonwealth, 280 Va. 545, 555–56, 701 S.E.2d 441, 446–47 (2010)*; *Jones v. Commonwealth, 272 Va. 692, 701, 636 S.E.2d 403, 408 (2006)*; *Barnes v. Commonwealth, 47 Va. App. 105, 111, 622 S.E.2d 278, 280–81 (2005).*

PRACTICE COMMENTARY: The cases employ slightly different formulations in articulating what constitutes criminal negligence. Criminal negligence is an objective standard. *Jones, 272 Va. at 701, 636 S.E.2d at 408.*

Whether a defendant's conduct is criminally negligent "will be specific to the circumstances of each case and, thus, whether a defendant's conduct is criminally negligent is usually a question for the trier of fact, unless reasonable minds could not differ." *Carosi, 280 Va. at 556, 701 S.E.2d at 447.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.6, 4.7

MICHIE'S JURISPRUDENCE, Negligence § 7

Instruction No. 29.400

Production, etc., of Child Pornography

The defendant is charged with the crime of [enticing; accosting; soliciting] **a person less than 18 years of age with intent** [to induce; to force] **such person** [to perform in; to be a subject of] **child pornography. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant:

[(a) [enticed; accosted; solicited] (name of child) with intent [to induce; to force] him [to perform in; to be a subject of] child pornography; or,

(b) [produced; made; attempted or prepared to make] child pornography; or,

(c) knowingly [took part in; participated in] [the filming; the photographing or other production] of child pornography; or,

(d) knowingly [financed; attempted or prepared to finance] child pornography] **and,**

(2) That (name of child) **was less than 18 years of age.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.400

Production, etc., of Child Pornography

You have found the defendant guilty of the crime of producing child pornography.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-374.1, 18.2-390.

CASE AUTHORITY:

Ele v. Commonwealth, 70 Va. App. 543, 549–52, 829 S.E.2d 564, 567–69 (2019); *Sandoval v. Commonwealth, 64 Va. App. 398, 418–20, 768 S.E.2d 709, 719–20 (2015)*; *Mason v. Commonwealth, 49 Va. App. 39, 46–48, 636 S.E.2d 480, 483–84 (2006)*; *Asa v. Commonwealth, 17 Va. App. 714, 718–19, 441 S.E.2d 26, 28–29 (1994)*; *Frantz v. Commonwealth, 9 Va. App. 348, 352–54, 388 S.E.2d 273, 275–76 (1990)*; *Freeman v. Commonwealth, 223 Va. 301, 305–13, 288 S.E.2d 461, 463–67 (1982)*.

PRACTICE COMMENTARY: It may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age. Va. Code Ann. § 18.2-374.1(D). Proof of the actual identity of the child is not necessary to prosecution. Va. Code Ann. § 18.2-374.1(A).

Va. Code Ann. §§ 18.2-374.1(C)(1) and (C)(2) specify mandatory minimum sentences depending on the age of the victim, the age of the defendant, and whether the defendant is a repeat offender.

Va. Code Ann. § 18.2-374.1:1(C)(i) makes it a felony to knowingly "reproduce[] by any means" child pornography.

There does not appear to be an exception in the statute for a defendant who is a parent of the child victim. *Freeman, 223 Va. at 310, 288 S.E.2d at 466.*

ALERTS:

• This instruction relates to one of several offenses in Va. Code Ann. § 18.2-374.1 and may be used as a model in drafting instructions for other offenses appearing in that section.

• "Child pornography" and "sexually explicit visual material" are defined in Va. Code Ann. § 18.2-374.1(A). This definition of sexually explicit visual material incorporates by reference definitions in Va. Code Ann. § 18.2-390.

• See the related sexual assault instructions in Chapter 48.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.410

Possession of Child Pornography

The defendant is charged with the crime of possession of child pornography. The Commonwealth must prove beyond a reasonable doubt that the defendant knowingly possessed child pornography.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the above element of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the above element of the crime, then you shall find the defendant not guilty.

Instruction No. P29.410

Possession of Child Pornography

You have found the defendant guilty of the crime of possession of child pornography.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than (5) five years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-374.1:1(A), 18.2-374.1(A).

Case Authority:

Strickle v. Commonwealth, 68 Va. App. 321, 342–43, 808 S.E.2d 530, 540 (2017); *Kobman v. Commonwealth, 65 Va. App. 304, 307–11, 777 S.E.2d 565, 569 (2015)*; *Terlecki v. Commonwealth, 65 Va. App. 13, 23–25, 772 S.E.2d 777, 782–83 (2015)*; *Papol v. Commonwealth, 63 Va. App. 150, 153–56, 754 S.E.2d 918, 920–22 (2014)*; *Chapman v. Commonwealth, 56 Va. App. 725, 730–40, 697 S.E.2d 20, 23–28 (2010)*; *Midkiff v. Commonwealth, 280 Va. 216, 218–20, 694 S.E.2d 576, 577–78 (2010)*; *Kromer v. Commonwealth, 45 Va. App. 812, 817–21; 613 S.E.2d 871, 873–76 (2005).*

Practice Commentary: Instruction No. 29.430, Definition of Child Pornography, and Instruction No. 29.440, Definition of Sexually Explicit Visual Material, should be given with this instruction. Instruction No. 29.410, regarding possession of child pornography, was approved in *Chapman, 56 Va. App. at 730, 738, 697 S.E.2d at 23, 27.*

Where possession or constructive possession of child pornography is an issue in the case, a modified version of Instruction No. 22.330 possibly should be given. See *Kromer, 45 Va. App. at 819, 45 Va. App. at 814.* However, where there is no affirmative evidence that persons other than the defendant used the defendant's computer or had access to it during the relevant time periods or other affirmative evidence making possession or constructive possession an issue, the trial court should not give any instruction concerning constructive possession that would be inapplicable or might confuse the jury. *Chapman, 56 Va. App. at 735–39, 697 S.E.2d at 26–27.*

Digital images accessible by a defendant on the defendant's computer, including those in the "recycle bin," may support constructive possession by the defendant. However, digital images in unallocated space of a computer not accessible without forensic software cannot be shown to be in the defendant's possession without other indicia of knowledge, dominion, or control. *Kobman, 65 Va. at 307–08, 777 S.E.2d at 567.*

A second or subsequent violation is a Class 5 felony. Va. Code Ann. § 18.2-374.1:1(B). Where defendant downloaded twelve items of child pornography, the fact that the items were all downloaded simultaneously did not bar his conviction for 11 counts of possession of child pornography, second or subsequent violations. One of the images constituted the first image possessed, while all of the others qualified as second or subsequent images possessed. *Papol, 63 Va. App. at 153–56, 754 S.E.2d at 920–22.*

Alerts:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.420

Distribution, etc., of Child Pornography

The defendant is charged with the crime of [distribution; reproduction; display; electronic transmission] **of child pornography. The Commonwealth must prove beyond a reasonable doubt:**

(1) **that the defendant knowingly** [reproduced by any means, including by computer; sold; gave away; distributed; transmitted electronically; displayed; or, purchased] **child pornography; or,**

(2) **that the defendant knowingly possessed child pornography with the intent to** [sell; give away; distribute; transmit; display] **it; or,**

(3) **that the defendant knowingly** [commanded; entreated; or otherwise attempted to persuade] **another person to** [send; submit; transfer or provide to him/her] **any child pornography in order to gain entry into a** [group, association, or assembly of persons] **engaged in trading or sharing child pornography.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the element(s) of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt [any of the elements] **of the crime, then you shall find the defendant not guilty.**

The defendant is charged with the crime of [distribution; reproduction; display; possession] of child pornography. The Commonwealth must prove beyond a reasonable doubt:

(1) that the defendant knowingly possessed child pornography with the intent to [sell; distribute; reproduce; display] it; or

(2) that the defendant knowingly possessed child pornography with the intent to [sell; distribute; reproduce; display] it; or

(3) that the defendant knowingly [commanded; ensnared; or otherwise attempted to persuade] another person to [send; submit; transfer or provide to him/her] any child pornography in order to gain entry into a [group, association, or assembly of persons] engaged in trading or sharing child pornography.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt [one of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.420

Distribution, etc., of Child Pornography

You have found the defendant guilty of the crime of distribution of child pornography.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years in a state correctional facility.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-374.1:1(C).

CASE AUTHORITY:

Stickle v. Commonwealth, 68 Va. 321, 342–43, 808 S.E.2d 530, 540 (2017); *Kelley v. Commonwealth, 289 Va. 463, 469, 771 S.E.2d 672, 675 (2015).*

PRACTICE COMMENTARY: Instruction No. 29.430, Definition of Child Pornography, and Instruction No. 29.440, Definition of Sexually Explicit Visual Material, should be given with this instruction.

For a second or subsequent conviction for the defendant for distribution of child pornography, the range of punishment is also five years to twenty years in a state correctional facility; however, there is a mandatory minimum term of imprisonment of five years. The mandatory minimum term of imprisonment shall be served consecutively with any other sentence. See Va. Code Ann. § 18.2-374.1:1(C).

In *Kelley*, the Supreme Court of Virginia found the evidence was sufficient to prove a violation of Va. Code Ann. § 18.2-374.1:1(C)(i), where the defendant downloaded child pornography into a folder shared in a peer-to-peer file sharing program and he did not use available means to prevent other users from accessing his files. *289 Va. at 468–69, 771 S.E.2d at 674–75*. *Stickle* similarly involved a defendant's storage of child pornography on a computer in a folder available to others via a peer-to-peer file sharing network. *68 Va. App. at 335–38, 808 S.E.2d at 536–38*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles, § 89

Instruction No. 29.430

Definition of Child Pornography

Child pornography means sexually explicit visual material which utilizes, or has as a subject, an identifiable minor.

An identifiable minor is a person [who was a minor at the time the visual depiction was created, adapted, or modified; whose image as a minor was used in creating, adapting or modifying the visual depiction]**; and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.**

The Commonwealth is not required to prove the actual identity of the minor.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-374.1(A).

CASE AUTHORITY:

Ele v. Commonwealth, 70 Va. App. 543, 549–52, 829 S.E.2d 564, 567–68 (2019); *Terlecki v. Commonwealth, 65 Va. App. 13, 20–22, 772 S.E.2d 777, 780–81 (2015)*; *Chapman v. Commonwealth, 56 Va. App. 725, 730–40, 697 S.E.2d 20, 23–28 (2010)*.

PRACTICE COMMENTARY: The definition of "sexually explicit visual material" is provided in Instruction No. 29.440.

The definition of child pornography in Va. Code Ann. § 18.2-374.1(A) accommodates the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)*, which held that a federal statute prohibiting the production of child pornography was overbroad under the First Amendment because it permitted prosecution for pornography that did not contain actual children.

The trier of fact is competent to determine whether pornographic images depict actual people simply by looking at the images themselves. *Terlecki, 65 Va. App. at 21, 772 S.E.2d at 781*. The Commonwealth may also prove that the identifiable minor was an actual person through other competent evidence, such as testimony from a witness who observed the images, or through corroborated admissions by the defendant. *Id. at 22–23, 772 S.E.2d at 781–82*.

ALERTS:

• This instruction is to be used with Instruction Nos. 29.400 (production of child pornography) and 29.410 (possession of child pornography).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.440

Definition of Sexually Explicit Visual Material

Sexually explicit visual material means a [picture; photograph; undeveloped photograph; drawing; book; magazine; pamphlet; sculpture; motion picture film; digital image, including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present] **which depicts** [sexual bestiality; a lewd exhibition of nudity; sexual excitement; sexual conduct; sadomasochistic abuse]**.**

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-374.1(A).

CASE AUTHORITY:

Ele v. Commonwealth, 70 Va. App. 543, 549–52, 829 S.E.2d 564, 567–69 (2019); *Sandoval v. Commonwealth, 64 Va. App. 398, 414–16, 768 S.E.2d 709, 717–18 (2015)*; *Chapman v. Commonwealth, 56 Va. App. 725, 730–40, 697 S.E.2d 20, 23–28 (2010).*

PRACTICE COMMENTARY: Generally, each item of sexually explicit visual material involving an identifiable minor possessed by the defendant constitutes a separate offense. *Mason v. Commonwealth, 49 Va. App. 39, 48, 636 S.E.2d 480, 484 (2006).* Although a single image constitutes the "unit of prosecution," Va. Code Ann. § 18.2-374.1(A) provides that as a threshold for convictions of possession of child pornography based on materials found in a defendant's temporary Internet cache, the Commonwealth must first establish that "three or more images or streaming videos" depicting sexually explicit material involving an identifiable minor actually are stored on the computer's temporary Internet cache. *Chapman, 56 Va. App. at 734, 697 S.E.2d at 25.* Once that threshold of "three or more images or streaming videos" stored on the computer's temporary internet cache is satisfied, however, the permissible unit of prosecution for possession of child pornography under Va. Code Ann. § 18.2-374.1(A) corresponds to the number of individual items of sexually explicit visual material. *Id.*

"Lewd" is a word that is generally understood. It is a synonym of lascivious and indecent. *Dickerson v. City of Richmond, 2 Va. App. 473, 479, 346 S.E.2d 333, 336 (1986); Pedersen v. Richmond, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979)*; see also *Foster v. Commonwealth, 6 Va. App. 313, 329, 369 S.E.2d 688, 697–98 (1988)* (finding that the photographing of exposed nipples, although qualifying as nudity under the statute, is not the lewd exhibition of nudity absent an additional showing of indecency). Instruction No. 29.200 defines "lascivious."

Instruction No. 29.445 defines "nudity." Instruction No. 29.446 defines "sexual conduct." Instruction No. 29.447 defines "sexual excitement." Instruction No. 29.448 defines "sadomasochistic abuse." These instructions should be given to supplement Instruction No. 29.440 when the appropriate issue is presented in the case.

ALERTS:

- This definition is to be used with Instruction No. 29.430 (definition of child pornography).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Criag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.445

Definition of Nudity

Nudity means a state of undress [exposing the human male or female genitals, pubic area or buttocks with less than a full opaque covering; showing the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; depicting covered or uncovered male genitals in a discernibly turgid state].

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-390(2).

CASE AUTHORITY:

Asa v. Commonwealth, 17 Va. App. 714, 718, 441 S.E.2d 26, 29 (1994).

PRACTICE COMMENTARY: Nudity alone is not enough to make material legally obscene. Nude photographs must be lewd in order to be sexually explicit. *Asa, 17 Va. App. at 718, 441 S.E.2d at 29* (citing *Jenkins v. Georgia, 418 U.S. 153, 161 (1974)*).

ALERTS:

• This definition is to be used with Instruction Nos. 40.100 (definition of obscene) and 29.440 (definition of sexually explicit visual material).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89

Instruction No. 29.446

Definition of Sexual Conduct

Sexual conduct means [actual or explicitly simulated acts of (masturbation, homosexuality, sexual intercourse); physical contact in an act of apparent sexual stimulation or gratification with a person's clothed or unclothed (genitals, pubic area, buttocks, or female breast)].

Sources & Authority

Governing Statutes:

Va. Code Ann. § 18.2-390(3).

Case Authority:

None.

Practice Commentary:

None.

ALERTS:

• This instruction is to be used with Instruction Nos. 29.440 (definition of sexually explicit visual material) and 40.100 (definition of obscene).

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 5.13, 15.8

Michie's Jurisprudence, Adultery, Fornication and Lewdness §§ 9, 11; and Infants and Juveniles § 89

Instruction No. 29.447

Definition of Sexual Excitement

Sexual excitement means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-390(4).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

• This definition is to be used with Instruction Nos. 29.440 (definition of sexually explicit visual material) and 40.100 (definition of obscene).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Criag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.13, 15.8

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness §§ 9, 11; and Infants and Juveniles § 89

Instruction No. 29.448

Definition of Sadomasochistic Abuse

Sadomasochistic abuse means actual or explicitly simulated flagellation or torture by or upon a person who is [nude or clad in undergarments, a mask, or bizarre costume; fettered, bound or otherwise physically restrained by a person who is nude, or clad in undergarments, a mask, or bizarre costume].

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. § 18.2-390(5).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

• This definition is to be used with Instruction Nos. 29.440 (definition of sexually explicit visual material) and 40.100 (definition of obscene).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.13, 15.8

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness §§ 9, 11; and Infants and Juveniles § 89

Instruction No. 29.450

Use of Computer, etc. For Purposes of Solicitation of Minor

The defendant is charged with the crime of using a [computer; computer network; (name of other communications system or electronic means)] **for the purpose of soliciting, with lascivious intent, a person he knew, or had reason to believe, was less than 15 years of age for** (name of relevant activity). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant used a** [computer; computer network; (name of other communications system or electronic means)] **for the purposes of soliciting, with lascivious intent,** (name of child) **to engage in** (name of activity); and

(2) **That the defendant was 18 years of age or older at the time; and**

(3) **That the defendant knew, or had reason to believe, that** (name of child) **was less than 15 years of age at the time.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

prove beyond a reasonable doubt each of the following elements of that charge:

(1) That the defendant used a [computer; computer network; (name of other

(2) That the defendant was 18 years of age or older at the time; and

(3) That the defendant knew, or had reason to believe, that (name of child) was less than 15 years of age at the time.

reasonable doubt each of the above elements of the crime as charged, then you shall find the Defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.450

Use of Computer, etc. For Purposes of Solicitation of Minor

You have found the defendant guilty of the crime of using a [computer; computer network; (name of other communications system or electronic means)] **for the purposes of soliciting, with lascivious intent, a person he knew, or had reason to believe, was less than 15 years of age for** (name of activity).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

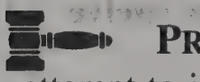
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-374.3.

CASE AUTHORITY:

Pick v. Commonwealth, 72 Va. App. 651, 667–669, 852 S.E.2d 479, 486–487 (2021); *Commonwealth v. Murgia, 297 Va. 310, 319–322, 827 S.E.2d 377, 382–83 (2019)*; *Hillman v. Commonwealth, 68 Va. App. 585, 599–600, 811 S.E.2d 853, 860–861 (2018)*; *Dietz v. Commonwealth, 294 Va. 123, 133–36, 804 S.E.2d 309, 314–16 (2017)*; *Toghill v. Commonwealth, 289 Va. 220, 226–27, 768 S.E.2d 674, 677 (2015)*; *Brooker v. Commonwealth, 41 Va. App. 609, 613–15, 587 S.E.2d 732, 734–35 (2003)*.



PRACTICE COMMENTARY: Criminal solicitation has been defined as the attempt to incite or persuade another to commit a criminal offense with the intent of causing the commission of that offense. *Brooker, 41 Va. App. at 614, 587 S.E.2d at 734.*

Bloom v. Commonwealth, 262 Va. 814, 820–22, 554 S.E.2d 84, 87–88 (2001) discusses the admissibility of internet communications in a prosecution under Va. Code Ann. § 18.2-370.

The jury could infer that defendant knew or had reason to know that the minor he solicited was less than fifteen years of age when she provided medical release showing her age and birthday to the church where defendant worked as a youth pastor and when defendant guessed her age as fourteen or fifteen during an interview with police. *Hillman, 68 Va. App. at 599–600, 811 S.E.2d at 860–61.*

To convict for use of a computer for purposes of solicitation of a minor, the Commonwealth must prove only that a defendant used a communications system for the purposes of soliciting, not that a defendant actually committed the act. *Murgia, 297 Va. at 320–21, 827 S.E.2d at 383.* Such a purpose may be inferred by a pattern of sexually explicit messages between a high school track coach and a sixteen-year-old member of the track team. *Id. 279 Va. at 322, 827 S.E.2d at 384.*

In *Stoltz v. Commonwealth, 297 Va. 529, 535–38, 831 S.E.2d 164, 169–71 (2019)*, the Supreme Court of Virginia rejected a First Amendment challenge to Va. Code Ann. 18.2-374.3(C), concluding that the "reason to believe" language in the statute was not unconstitutionally vague and that the statute as a whole was not overbroad under the First Amendment, as it criminalizes conduct rather than speech. In *Podracky v. Commonwealth, 52 Va. App. 130, 136–43, 662 S.E.2d 81, 84–88 (2008)*, the Court of Appeals upheld Va. Code Ann. § 18.2-374.3 against a First Amendment challenge, relying on federal decisions holding that there is no First Amendment right to persuade minors to engage in illegal sex acts.

Venue is proper where the messages are received. *Spiker v. Commonwealth*, 58 Va. App. 466, 711 S.E.2d 228 (2011).

ALERTS:

• The above instructions should only be used where the defendant is charged with the Class 5 felony under subsection (C) of Va. Code Ann. § 18.2-374.3, for the purposes of soliciting, with lascivious intent. The instructions must be modified where the defendant is charged with a violation of subsection (B) of Va. Code. Ann. § 18.2-374.3, which makes it a Class 6 felony to use a computer or communications system for procuring or promoting the use of a minor for any activity in violation of Va. Code Ann. §§ 18.2-370 or 18.2-374.1. Va. Code Ann. § 18.2-374.3(B) does not require proof of actual knowledge of the child victim's age but rather proof that the defendant "knows or has reason to believe" the subject of solicitation is a child, when read in the context of the statute. *Ducharme v. Commonwealth, 70 Va. App. 668, 677–79, 830 S.E.2d 924, 929–30 (2019)* and *Dietz, 294 Va. at 133–36, 804 S.E.2d at 314–16*, both involved a charge under Va. Code Ann. § 18.2-374(B). In *Ducharme*, the Court of Appeals held that the Commonwealth is not required to prove that the defendant had actual knowledge of the victim's age and that there was no error in the trial court instructing the jury that the defendant had "reason to believe" the subject of the solicitation was a minor.

• The instructions must also be modified when the defendant is charged with a violation of subsection (D). Under that subsection the age of the victim is at least 15, but less than 18.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 15.8

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness §§ 9, 11; and Infants and Juveniles § 89

of the victim's age and that there was no error in the trial court instructing the jury that the defendant had "reason to believe" the subject of the solicitation was a minor.

less than 18.

tion" and "sex offense"

Imprisonment, sentencing, suspension and [illegible] 25 § 11; and felons and [illegible] 5 50

Instruction No. 29.500

Contributing to Delinquency of Minor

The defendant is charged with the crime of contributing to the delinquency of a minor. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant willfully** [contributed to; encouraged; caused] [an act; an omission; a condition] **which rendered** (name of child) [delinquent; in need of services; in need of supervision; abused; neglected]; **and**

(2) **That the defendant was 18 years old or older at the time; and**

(3) **That** (name of child) **was under 18 years old at the time.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Contributing to Delinquency of Minor

If you find that the defendant contributed to the delinquency of a minor, you must determine whether such minor lacked a reasonable degree of the following elements at that time:

(1) That the defendant wilfully [proximately] caused or encouraged an omission; a condition[, which rendered (name of child) delinquent, in need of services; in need of supervision; abused; neglected]; and

(2) That the defendant was [18 years (or more)] [under 18 years old] at the time; and

(3) That (name of child) was under 18 years old at the time.

If you find that all elements of the crime have been proved beyond a reasonable doubt, you must find the defendant guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P29.500

Contributing to Delinquency of Minor

You have found the defendant guilty of the crime of contributing to delinquency of a minor.

Upon consideration of all the evidence you have heard, you shall fix punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-371.

CASE AUTHORITY:

Spell v. Commonwealth, 72 Va. App. 629, 635–38, 851 S.E.2d 83, 86–88 (2020); Hannon v. Commonwealth, 68 Va. App. 87, 93–98, 803 S.E.2d 355, 358–361 (2017); Miller v. Commonwealth, 64 Va. App. 527, 538–46, 769 S.E.2d 706, 711–15 (2015); DeAmicis v. Commonwealth, 31 Va. App. 437, 444–45, 524 S.E.2d 151, 154 (2000).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-371 applies to any person 18 or older, including the parents of the child.

This offense is not a lesser included offense of aggravated sexual battery. See *Kauffmann v. Commonwealth, 8 Va. App. 400, 409, 382 S.E.2d 279, 284 (1989).*

Instruction No. 29.500 covers subsection (i) of Va. Code Ann. § 18.2-371, addressing abused, neglected, or delinquent children; it may also be used as a model for offenses under subsection (ii), addressing consensual sexual activity with children over the age of 15.

☞ ***PRACTICE POINTER:***

The terms "abused or neglected child," "child in need of services," "child in need of supervision," and "delinquent child" are defined in Va. Code Ann. § 16.1-228.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

MICHIE'S JURISPRUDENCE, Infants and Juveniles §§ 89–90

CHAPTER 30

FORGERY

Scope Note

Instruction No. 30.100 Forgery—General

Instruction No. P30.100 Forgery—General

Instruction No. 30.200 Falsely Obtaining Signature

Instruction No. P30.200 Falsely Obtaining Signature

Instruction No. 30.300 Uttering

Instruction No. P30.300 Uttering

Instruction No. 30.400 Possession of Forged Writing

Instruction No. 30.500 Presumption of Authority to Make Writing for Another

Instruction No. 30.600 Forging Public Record

Instruction No. P30.600 Forging Public Record

Instruction No. 30.610 Public Record—Definition

Instruction No. 30.620 Uttering Forged Public Record

Instruction No. P30.620 Uttering Forged Public Record

Instruction No. 30.700 Forgery Equipment

Instruction No. P30.700 Forgery Equipment

SCOPE NOTE

These instructions cover the principal crimes set forth in Va. Code Ann. §§ 18.2-168 to 18.2-173.

Instruction Nos. 30.100, 30.200, and 30.300, based on Va. Code Ann. § 18.2-172, deal with the basic types of forgery offenses. Instruction No. 30.100 covers the actual making or altering of a fraudulent writing. Instruction No. 30.200 is used in cases where the defendant fraudulently obtains the signature of another person. For a similar crime, see Instruction No. 27.100, Obtaining Signature by False Pretense, and its Sources & Authority statement. Instruction No. 30.300 is limited to uttering, which is an attempt by the defendant fraudulently to use a forged writing.

Instruction No. 30.400 covers the inference of forgery which may be drawn from the possession of a forged writing.

Instruction No. 30.500 deals with the presumption that one who makes a writing for another has the authority to do so.

Instruction No. 30.600, based on Va. Code Ann. § 18.2-168, is limited to the forging of a public record and the forging of a certificate, return, or attestation of a public officer or public employee. Instruction No. 30.610 defines public record. Instruction No. 30.620 covers the uttering of a forged public record.

Instruction No. 30.700, based on Va. Code Ann. § 18.2-171, is confined to crimes that involve forgery equipment.

These Code provisions contain other crimes for which no instructions have been provided: the forging of, or the keeping of an instrument for forging, a seal (Va. Code Ann. § 18.2-169); the forging of coins or bank notes (Va. Code Ann. § 18.2-170); the falsifying, altering, or fraudulent use of transcripts or diplomas (Va. Code Ann. § 18.2-172.1); maliciously affixing another's signature to a writing (Va. Code Ann. § 18.2-172.2); and the possession of forged coins or bank notes (Va. Code Ann. § 18.2-173).

For other statutes dealing with forgery, see the Scope Notes for Chapters 13 ("Computer Crimes") and 16 ("Credit Card Offenses").

Instruction No. 30.100

Forgery—General

The defendant is charged with the crime of forgery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant, with intent to defraud, [falsely made; materially altered] (describe writing);

(2) Without authority to do so; and

(3) To the prejudice of another's right.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P30.100

Forgery—General

You have found the defendant guilty of the crime of forgery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-172.

CASE AUTHORITY:

Beshah v. Commonwealth, 60 Va. App. 161, 169–72, 725 S.E.2d 144, 148–49 (2012); *Oliver v. Commonwealth, 35 Va. App. 286, 295–96, 544 S.E.2d 870, 874–75 (2001); Dillard v. Commonwealth, 32 Va. App. 515, 517–19, 529 S.E.2d 325, 326–27 (2000); Stevenson v. Commonwealth,258 Va. 485, 487–88, 522 S.E.2d 368 (1999); Bowman v. Commonwealth,28 Va. App. 204, 213–15, 503 S.E.2d 241, 245–46 (1998); Walker v. Commonwealth, 25 Va. App. 50, 58–59, 486 S.E.2d 126, 130–31 (1997); Bateman v. Commonwealth, 205 Va. 595, 599–601, 139 S.E.2d 102, 105–06 (1964); Bullock v. Commonwealth, 205 Va. 558, 561–62, 138 S.E.2d 261, 263–64 (1964); Hanbury v. Commonwealth, 203 Va. 182, 187, 122 S.E.2d 911, 914–15 (1961).*

PRACTICE COMMENTARY: Forgery is the fraudulent making or alteration of a writing "to the prejudice of another [person's] right." *Bullock, 205 Va. at 561, 138 S.E.2d at 263*. A violation of Va. Code Ann. § 18.2-172 is punishable as a Class 5 felony. "A city is a 'person' whose rights may be prejudiced by a forgery." *Hanbury, 203 Va. at 187, 122 S.E.2d at 914*.

Actual prejudice is not required to establish a prima facie case of forgery. Rather, the bare possibility of prejudice is sufficient under Va. Code Ann. § 18.2-172. *Muhammad v. Commonwealth, 13 Va. App. 194, 196, 199, 409 S.E.2d 818, 819, 821 (1991)*; *Gordon v. Commonwealth, 100 Va. 825, 830, 41 S.E. 746, 748 (1902)* ("It is only necessary . . . that [the document in question] was a writing of such apparent legal efficacy that the forgery of it might have been used to the prejudice of another's rights."). For example, an LPN at a nursing facility was guilty of forgery where she falsely noted the administration of medication and provision of treatment to an elderly patient, resulting in potential prejudice. *Beshah, 60 Va. App. at 170–72, 725 S.E.2d at 148–49*.

Forgery and uttering are separate and distinct offenses. *Oliver, 35 Va. App. at 295, 544 S.E.2d at 874–75; Johnson v. Commonwealth, 102 Va. at 929, 46 S.E. at 790 (1904)*. Forgery and uttering may be charged in separate counts in the same indictment, and the defendant may be found guilty and punished for each offense separately. *Bateman, 205 Va. at 599, 139 S.E.2d at 105*. However, there can be no uttering when the document that is the basis of the charge is not a forgery. *Henry v. Commonwealth, 63 Va. App. 30, 42, 753 S.E.2d 868, 873 (2014)*.

This section does not include forgery of a public document covered under Va. Code Ann. § 18.2-168 and currency under Va. Code Ann. § 18.2-170. For instructions pertaining to forging a public record and uttering a forged public record, respectively, see Instruction Nos. 30.600 and 30.620.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1-27; and Forgery §§ 1–25

Instruction No. 30.200

Falsely Obtaining Signature

The defendant is charged with the crime of forgery by false pretense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant obtained the signature of** (name person) **to a** (describe kind of writing);

(2) **By false representation;**

(3) **With intent to defraud.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P30.200

Falsely Obtaining Signature

You have found the defendant guilty of the crime of forgery by false pretense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-172.

CASE AUTHORITY:

Walker v. Commonwealth, 25 Va. App. 50, 58–59, 486 S.E.2d 126, 130–31 (1997); Riegert v. Commonwealth, 218 Va. 511, 518–19, 237 S.E.2d 803, 807–08 (1977); Bourgeois v. Commonwealth, 217 Va. 268, 272–73, 227 S.E.2d 714, 717–18 (1976); Lewis v. Commonwealth, 120 Va. 875, 880, 91 S.E. 174, 176 (1917); Trogdon v. Commonwealth, 72 Va. (31 Gratt.) 862, 872, 884–85 (1878); Fay v. Commonwealth, 69 Va. (28 Gratt.) 912, 916–17 (1877); Anable v. Commonwealth, 65 Va. (24 Gratt.) 563, 568 (1873).

PRACTICE COMMENTARY: In *Lewis*, the Supreme Court of Virginia affirmed the conviction of the defendant for obtaining a check by false pretenses, stating that "[t]he substance of such a charge is that the accused has fraudulently converted that sum of money to his own use." *120 Va. at 880, 91 S.E. at 176.*

The Supreme Court of Virginia has taken different positions on which element is the most significant. On the one hand, the Court has asserted that fraudulent intent is the key to the offense. *Trogdon, 72 Va. (31 Gratt.) at 872.* On the other hand, the Court has focused on the false pretenses: "[T]he gravamen of the offence [is] *that the pretences are false*; and if the [defendant] can show that the representations . . . *are true* he cannot be convicted; and certainly all testimony tending to show that fact is proper to be considered by the jury." *Anable, 65 Va. (24 Gratt.) at 568* (emphasis added).

In *Trogdon,* the Court maintained that the "but for" test must be used to determine whether the false pretenses were the decisive cause that induced the owner to part with his property. *72 Va. at 884–85.* However, in *Fay*, the Court seemed to endorse a lesser standard. *69 Va. at 916–17.* While the Court accepted the "but for" test as a general guide, it also stated that the false pretense need only have had a decisive influence on the mind of the owner. *Id.* The Court said that it was sufficient that the pretense be "part of the moving causes," and that it was not necessary that the owner be induced solely by the pretense. *Id. at 917.*

The reasoning of the decision in *Fay* was upheld in *Bourgeois*, where the Court said that the pretenses "to some degree must have induced the owner to part with his property." *Bourgeois, 217 Va. at 272, 227 S.E.2d at 717.*

ALERTS:

• See Instruction No. 27.100 ("Obtaining Signature by False Pretense"); compare Va. Code Ann. §§ 18.2-172 and 18.2-178.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.1–13.7,

14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

Instruction No. 30.300

Uttering

The defendant is charged with the crime of uttering a forged writing. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant did, directly or indirectly, attempt to use a forged (describe writing)**;**

(2) Asserted by word or act that the forged (describe writing) **was good and valid or true;**

(3) With intent to defraud;

(4) Knowing the writing was forged.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix his punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P30.300

Uttering

You have found the defendant guilty of the crime of uttering a forged writing.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-172.

CASE AUTHORITY:

Brown v. Commonwealth, 56 Va. App. 178, 187–89, 692 S.E.2d 271, 276–77 (2010); Bateman v. Commonwealth, 205 Va. 595, 599–600, 139 S.E.2d 102, 105–06 (1964); Johnson v. Commonwealth, 102 Va. 927, 929–30, 46 S.E. 789, 790 (1904).

PRACTICE COMMENTARY: Uttering "is an assertion by word or action that a writing known to be forged is good and valid." *Bateman, 205 Va. at 600, 139 S.E.2d at 106.*

"[F]orging and uttering are separate and distinct offenses." *Johnson, 102 Va. at 929, 46 S.E. at 790.* Forgery and uttering may be charged in separate counts in the same indictment, and the defendant may be found guilty and punished for each offense separately. *Bateman, 205 Va. at 599, 139 S.E.2d at 105.* However, there can be no uttering when the document that is the basis of the charge is not a forgery. *Henry v. Commonwealth*, 63 Va. App. 30, 42, 753 S.E.2d 868, 873 (2014).

Uttering and forgery may be completed simultaneously when the act of forging a writing is the same act that makes the assertion that the writing is good and true. See *Bennett v. Commonwealth, 48 Va. App. 354, 358, 631 S.E.2d 332, 334 (2006)* (defendant's act of signing a false name to a computer screen to obtain a duplicate driver's license is both forgery and uttering).

The single larceny doctrine, according to which a series of larcenous acts are considered a single act of larceny if they are done pursuant to a single impulse and in execution of a general fraudulent scheme, does not apply to the crime of uttering a forged writing because it is not a larceny offense. *Moore v. Commonwealth, 59 Va. App. 795, 815, 722 S.E.2d 668, 678 (2012).*

Intent to utter "may be inferred from the facts and circumstances of the case and shown by the acts of the defendant." *Hawkins v. Commonwealth, 288 Va. 482, 487, 764 S.E.2d 81, 84 (2014)* (uttering counterfeit money under Va. Code Ann. § 18.2-170).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

Instruction No. 30.400

Possession of Forged Writing

Possession of a forged writing by the defendant who tries to use it to obtain money thereon creates an inference that the defendant forged the writing, unless upon consideration of all the evidence you have a reasonable doubt that the defendant forged the writing.

OR

You may infer that the defendant forged (describe writing) **if the defendant possessed the forged** (describe writing) **and attempted to obtain money with it, unless upon consideration of all the evidence you have a reasonable doubt that the defendant forged the** (describe writing).

Note:

Two alternative expressions of the inference that may be drawn based on the defendant's possession of a forged writing and the defendant's attempt to obtain money through use of that writing are presented. Only one of these alternatives should be used.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Walker v. Commonwealth, 25 Va. App. 50, 58–60, 486 S.E.2d 126, 130–31 (1997); Fitzgerald v. Commonwealth, 227 Va. 171, 174, 313 S.E.2d 394, 395 (1984); Bullock v. Commonwealth, 205 Va. 558, 562–63, 138 S.E.2d 261, 264–65 (1964); Bateman v. Commonwealth, 205 Va. 595, 600–01, 139 S.E.2d 102, 106–07 (1964).

PRACTICE COMMENTARY: "[T]he unexplained possession of a forged instrument by one who endeavors to obtain money thereon is prima facie evidence that such person forged the instrument, but . . . such prima facie evidence may be rebutted by an explanation satisfactory to the jury as to how he came into possession of the instrument." *Bullock, 205 Va. at 563, 138 S.E.2d at 265.*

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.3 13.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery§§ 1–25

Instruction No. 30.500

Presumption of Authority to Make Writing for Another

In the absence of other evidence to the contrary, one who makes and signs a writing for another is presumed to have authority to do so.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Bowman v. Commonwealth, 28 Va. App. 204, 214–15, 503 S.E.2d 241, 246 (1998); Lewis v. Commonwealth, 213 Va. 156, 156–57, 191 S.E.2d 232, 233 (1972); Lawson v. Commonwealth, 201 Va. 663, 667, 112 S.E.2d 899, 901–02 (1960).

PRACTICE COMMENTARY:

None.

ALERTS:

• Although the death of a principal terminates an agent's authority, the Commonwealth must prove beyond a reasonable doubt that the defendant knew the authority had terminated because the intent to defraud is an element of the offense. *Bowman, 28 Va. App. at 214–15, 503 S.E.2d at 246.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; Forgery §§ 1–25

Instruction No. 30.600

Forging Public Record

The defendant is charged with the crime of [forging a public record; forging a certificate, return, or attestation of a public officer or public employee]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [falsely made; materially altered] **a** [public record; certificate, return, or attestation of a public officer or public employee in relation to a matter where such public record, certificate, return, or attestation may be received as legal proof]**;**

(2) With the intent to defraud.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P30.600

Forging Public Record

You have found the defendant guilty of the crime of [forging a public record; forging a certificate, return, or attestation of a public officer or public employee].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-168.

CASE AUTHORITY:

Henry v. Commonwealth, 63 Va. App. 30, 38–42, 753 S.E.2d 868, 871–73, (2014); Rodriquez v. Commonwealth, 50 Va. App. 667, 671–73, 653 S.E.2d 296, 298–99 (2007); Hines v. Commonwealth, 39 Va. App. 752, 755–59, 576 S.E.2d 781, 783–85 (2003); Coston v. Commonwealth, 29 Va. App. 350, 352–53, 512 S.E.2d 158, 159–60 (1999); Campbell v. Commonwealth, 246 Va. 174, 179–84, 431 S.E.2d 648, 651–54 (1993).

PRACTICE COMMENTARY: There are three essential elements to a public record: (1) it must be in writing; (2) it must be made by a public officer; and (3) that officer must have the legal authority to make such a writing. *Hines, 39 Va. App. at 758, 576 S.E.2d at 784.*

"Public record" is defined within Va. Code Ann. § 42.1-77. See also Instruction No. 30.610.

Harm or prejudice to the right of another is not an element of the crime of forgery of public records. *Campbell, 246 Va. at 184, 431 S.E.2d at 654.* However, forgery, in violation of Va. Code Ann. § 18.2-172, requires proof of actual or possible prejudice to the rights of another. For a discussion of prejudice in that context, see the Practice Commentary to Instruction No. 30.100.

Although the defendant does not personally write the false information given to the public officer as the officer creates the document, the defendant has engaged in the "false making" of the document. *Rodriquez, 50 Va. App. at 672, 653 S.E.2d at 298.* But improperly causing another to create a document that does not contain false information is not a forgery. *Brown v. Commonwealth, 56 Va. App. 178, 188–89, 692 S.E.2d 271, 276–77 (2010).*

In *Henry*, the Court of Appeals of Virginia reversed the defendant's conviction for forgery based upon false statements concerning his assets made in a public record to determine his eligibility for indigent defense services. *Henry, 63 Va. App. at 40–42, 753 S.E.2d at 872–73.* Forgery requires the false making or materially altering of a document with the intent to defraud. Where the falsity lies in the representation of facts, as opposed to falsity in the execution of a document, it is not forgery. *Id. at 38–39, 753 S.E.2d at 871–72.*

☞ ***PRACTICE POINTER:***

A registered security officer engaged in a duty specifically granted by statute is a "public officer or public employee" for purposes of Va. Code Ann. § 18.2-168. *Coston, 29 Va. App. at 352–53, 512 S.E.2d at 159–160.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.713.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

Instruction No. 30.610

Public Record—Definition

A public record is any recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. The determination of a public record does not depend on the physical form or characteristic of the recorded information or on the medium upon which such information is recorded. The recorded information constitutes a public record if it is (1) produced, (2) collected, (3) received, or (4) retained in pursuance of law or in connection with the transaction of public business.

Sources & Authority

Governing Statute:

Va. Code Ann. § 42.1-77

Case Authority:

Moreno v. Commonwealth, 65 Va. App. 121, 126–27, 775 S.E.2d 422, 424 (2015); Hines v. Commonwealth, 39 Va. App. 752, 758, 576 S.E.2d 781, 784 (2003).

Practice Commentary: A traffic summons is a public document. *Rodriquez v. Commonwealth, 50 Va. App. 667, 671, 653 S.E.2d 296, 298 (2007).*

Alerts:

None

Research References:

Ronald J. Bacigal, *Criminal Offenses and Defenses in Virginia*, "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 13.1–13.7, 14.1–14.4, 16.1

Michie's Jurisprudence, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

Instruction No. 30.620

Uttering Forged Public Record

The defendant is charged with the crime of [uttering a forged public record; uttering a certificate, return, or attestation of a public officer or public employee]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant did, directly or indirectly, attempt to use a forged** [public record; certificate, return, or attestation of a public officer or public employee in relation to a matter where such public record, certificate, return, or attestation may be received as legal proof]**;**

(2) **Asserted by word or act that the forged** [public record; certificate, return, or attestation of a public officer or public employee in relation to a matter where such public record may be received as legal proof] **was good and valid or true;**

(3) **With intent to defraud;**

(4) **Knowing the** [public record; certificate, return or attestation of a public officer or public employee in relation to a matter where such public record may be received as legal proof] **was forged.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix his punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Uttering Forged Public Record

The defendant is charged with the crime of [uttering a forged public record; uttering a certificate, return, or attestation of a public officer or public employee]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant did, directly or indirectly, attempt to use a forged public record; certificate, return, or attestation of a public officer or public employee [illegible] or attestation may be received as legal proof];

(2) Asserted by word or act that the forged [public record; certificate, return, or attestation of a public officer or public employee in relation to a matter where such public record may be received as legal proof] was good and valid or true;

(3) With intent to defraud;

(4) Knowing the [public record; certificate, return or attestation of a public [illegible] may be received as legal proof] was forged.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you [illegible]

If you find that the Commonwealth has failed to prove beyond a reasonable [illegible] defendant not guilty.

Instruction No. P30.620

Uttering Forged Public Record

You have found the defendant guilty of the crime of uttering a forged public record.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-168.

Case Authority:

Goodwin v. Commonwealth, 64 Va. App. 322, 326–30, 767 S.E.2d 741, 744–45 (2015); *Henry v. Commonwealth, 63 Va. App. 30, 37–42, 753 S.E.2d 868, 871–73 (2014)*; *Rodriquez v. Commonwealth, 50 Va. App. 667, 671–72, 653 S.E.2d 296, 298 (2007)*; *Moreno v. Commonwealth, 65 Va. App. 121, 126–31, 775 S.E.2d 422, 424–27 (2015)*; *Bennett v. Commonwealth, 48 Va. App. 354, 356–58, 631 S.E.2d 332, 333–34 (2006)*.

Practice Commentary: The purpose of Virginia Code Ann. § 18.2-168 "is to protect society against the fabrication, falsification and the uttering of instruments which *might* be acted upon as being genuine." *Rodriquez, 50 Va. App. at 671, 653 S.E.2d at 298*; *Muhammad v. Commonwealth, 13 Va. App. 194, 199, 409 S.E.2d 818, 821 (1991)* (emphasis in original).

Virginia Code Ann. § 18.2-168 "prohibits two distinct offenses: forging a public record and uttering, or attempting to employ as true, the forged record." *Goodwin, 64 Va. App. at 327, 767 S.E.2d at 744*.

The definition of "uttering" is "an assertion by word or action that a writing known to be forged is good and valid." *Id. at 331, 767 S.E.2d at 746*; *Bateman v. Commonwealth, 205 Va. 595, 600, 139 S.E.2d 102, 106 (1964)*.

Where, during a routine traffic stop, a defendant identified himself with a false name, signed summonses under that name, and returned the summonses to a deputy sheriff with the intent to convey that the false signatures were true, he is guilty of uttering the summonses in violation of Virginia Code Ann. § 18.2-168. *Goodwin, 64 Va. App. at 330–31, 767 S.E.2d at 746*.

There can be no uttering when the document that is the basis of the charge is not a forgery. *Henry, 63 Va. App. at 42, 753 S.E.2d at 873*.

Alerts:

None.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Check Offenses" and "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 13.1–13.7, 14.1–14.4, 16.1

Michie's Jurisprudence, Counterfeiting §§ 1-16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

Instruction No. 30.700

Forgery Equipment

The defendant is charged with the crime of making or having something designed for forging a writing or some other thing. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [engraved; stamped; cast; made or mended; possessed] **a** [plate; block; press; thing] **adapted and designed for the forging and false making of a** (describe writing or other thing)**; and**

(2) **That the defendant intended** [to use; to cause or permit to be used] **such** [plate; block; press; thing] **in forging or false making of** (describe writing or other thing)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P30.700

Forgery Equipment

You have found the defendant guilty of the crime of making or having something designed for forging a writing or some other thing.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-171.

CASE AUTHORITY:

Hanbury v. Commonwealth, 203 Va. 182, 188, 122 S.E.2d 911, 915 (1961); Smith v. Commonwealth, 190 Va. 10, 13–15, 55 S.E.2d 427, 428–29 (1949).

PRACTICE COMMENTARY: The statutory language has been interpreted more specifically in *Smith*. In particular, "adapted" is defined as "capable of being used" and "designed" as "appropriate, fit, prepared, or suitable; also, adapted, designated, or intended." *Smith, 190 Va. at 15, 55 S.E.2d at 429.*

"Designed" may sometimes refer to the purpose for which the instrumentality was planned or constructed. *Id.* However, the court further stated:

> What the statute condemns is either the making or mending or the possession of the instrumentality for an evil or unlawful purpose. It is immaterial . . . that it was originally planned, constructed and intended to be used for a lawful purpose.
>
> *Id.*

If the meaning of any of the above terms used in Instruction No. 30.700 is an issue, the language from *Smith* quoted above may be consulted to craft a definition instruction.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Forgery, Uttering and Counterfeiting"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 13.1–13.7, 14.1–14.4, 16.1

MICHIE'S JURISPRUDENCE, Counterfeiting §§ 1–16; False Pretenses and Cheats §§ 1–27; and Forgery §§ 1–25

CHAPTER 31

HABITUAL OFFENDER—MOTOR VEHICLE

Scope Note

Instruction No. 31.100 Habitual Offender—Combined Instruction

Instruction No. P31.100(a) Habitual Offender—Felony

Instruction No. P31.100(b) Habitual Offender—Misdemeanor

Instruction No. 31.210 Intoxication Alone Is Insufficient

SCOPE NOTE

Bifurcated trials are permitted in all prosecutions involving traffic offenses. Va. Code Ann. § 46.2-943. Bifurcated trials are mandated in all habitual offender felony and misdemeanor trials. Va. Code Ann. § 19.2-295.1.

Instruction No. 31.100 is a combined instruction, containing the elements of both the habitual offender felony and the habitual offender misdemeanor.

Instruction No. 31.210 addresses the principle that intoxication alone is not sufficient to establish that the defendant endangered the life, limb, or property of another.

Instruction No. 31.100

Habitual Offender—Combined Instruction

The defendant is charged with the crime of operating a [motor vehicle; self-propelled machinery or equipment] **after having been found to be an habitual offender. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant has been found to be an habitual offender and his privilege to operate a [motor vehicle; self-propelled machinery or equipment] **on the highways of this State has been revoked; and**

(2) That the defendant had actual notice that he had been found to be an habitual offender and that his privilege to operate a [motor vehicle; self-propelled machinery or equipment] **in this State had been revoked; and**

(3) That the defendant operated a [motor vehicle; self-propelled machinery or equipment] **on the highways of this State while revocation of the defendant's driving privileges remained in effect; and**

[(1) That the defendant has been found to be an habitual offender and ordered not to operate a [motor vehicle; self-propelled machinery or equipment] on the highways of this State; and

(2) That the defendant had actual notice that he had been found to be an habitual offender and ordered not to operate a [motor vehicle; self-propelled machinery or equipment] in this State; and

(3) That the defendant operated a [motor vehicle; self-propelled machinery or equipment] on the highways of this State while the order prohibiting his operation of a [motor vehicle; self-propelled machinery or equipment] was in effect; and]

(4) That the defendant's operation of the [motor vehicle; self-propelled machinery or equipment] [of itself endangered the life, limb or property of another; was a second or subsequent offense; took place while the defendant [was under the influence in violation of Va. Code Ann. § 18.2-266; committed involuntary or aggravated involuntary manslaughter in violation of Va. Code Ann. § 18.2-36.1; maimed another in violation of Va. Code Ann. § 18.2-51.4; operated a commercial vehicle while intoxicated in violation of Va. Code Ann. § 46.2-341.24] after having previously been convicted of [driving under the influence in violation of Va. Code Ann. § 18.2-266; involuntary or aggravated involuntary manslaughter in violation of Va. Code Ann. § 18.2-36.1; maiming another in violation of Va. Code Ann. § 18.2-51.4; operating a commercial vehicle while intoxicated in violation of Va. Code Ann. § 46.2-341.24].

(5) If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of operating a motor

vehicle after having been found to be a habitual offender, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

(6) If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first three elements of the crime but not the fourth element, then you shall find the defendant guilty of the misdemeanor of operating a motor vehicle after having been found to be a habitual offender, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

(7) If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first three elements of the crime, then you shall find the defendant not guilty.

Notes On Use of Combined Instruction:

Paragraphs numbered (1)–(3) above are set out in alternative form to account for statutory amendments to the Habitual Offender laws.

This instruction combines the elements of habitual offender felony (Va. Code Ann. § 46.2-357(B)(2) and (B)(3)) and habitual offender misdemeanor (Va. Code Ann. § 46.2-357(B)(1)). Paragraphs (1)–(3) in bold type are applicable to all cases where the defendant was determined to be an habitual offender on or after January 1, 1996 and should be used in all such cases. Paragraphs (1)-(3) in brackets and regular type are applicable to all cases where the defendant was adjudicated or determined an habitual offender **before** January 1, 1996 and should be used in those cases. Paragraph (7) must be included in all cases.

Paragraphs Applicable When Felony Submitted to Jury

The various alternative elements set forth in paragraph (4) and the finding paragraphs numbered (5) and (6) are applicable to every felony habitual offender offense. Paragraphs (4)-(6) should only be included when the felony offense is submitted to the jury.

Paragraphs Applicable When Only Misdemeanor Submitted to Jury

In those instances where **only** the misdemeanor offense is submitted to the jury, paragraphs (4)-(6) should be omitted in their entirety. The last sentence of paragraph (3) should be modified by deleting the semicolon and the word "and" at the end of that sentence and by inserting a period in their place. In addition, the following paragraph will need to be added after paragraph (3):

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the misdemeanor of operating a motor vehicle after having been found to be a habitual offender, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

Paragraph (7) should then follow. The words "first three" immediately preceding the word "elements" may be omitted.

Instruction No. P31.100(a)

Habitual Offender—Felony

You have found the defendant guilty of the crime of operating [a motor vehicle; self-propelled machinery or equipment] **after having been found to be an habitual offender.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in the penitentiary for a specific term, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for twelve (12) months.

Instruction No. P31.100(b)

Habitual Offender—Misdemeanor

You have found the defendant guilty of the crime of operation of [a motor vehicle; self-propelled machinery or equipment] **after having been found to be an habitual offender.**

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) Confinement in jail for a specific time, but not less than ten (10) days nor more than twelve (12) months; or

(2) Confinement in jail for a specific time, but not less than ten (10) days nor more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 46.2-357.

Case Authority:

Hodges v. Commonwealth, 64 Va. App. 687, 692–93, 771 S.E.2d 693, 695–96 (2015); *Boone v. Commonwealth, 63 Va. App. 383, 391–94, 758 S.E.2d 72, 76–78 (2014)*; *Thomas v. Commonwealth, 59 Va. App. 496, 505, 720 S.E.2d 157, 162 (2012)*; *Seaborn v. Commonwealth, 54 Va. App. 408, 412–13, 679 S.E.2d 565, 567 (2009)*; *Bishop v. Commonwealth, 275 Va. 9, 13, 654 S.E.2d 906, 908 (2008)*; *Lilly v. Commonwealth, 50 Va. App. 173, 181–85, 647 S.E.2d 517, 521–23 (2007)*; *Saunders v. Commonwealth, 48 Va. App. 196, 202–04, 629 S.E.2d 701, 704–05 (2006)*; *Commonwealth v. Norman, 268 Va. 539, 547–48, 604 S.E.2d 82, 86–87 (2004)*; *Wilson v. Commonwealth, 40 Va. App. 250, 254, 578 S.E.2d 831, 833 (2003)*; *Rose v. Commonwealth, 265 Va. 430, 435–36, 578 S.E.2d 758, 761 (2003)*; *Cuffee-Smith v. Commonwealth, 39 Va. App. 476, 481–83, 574 S.E.2d 294, 296–97 (2002)*; *Varga v. Commonwealth, 260 Va. 547, 550–52, 536 S.E.2d 711, 713–14 (2000)*; *Sears v. Commonwealth, 29 Va. App. 158, 161–62, 510 S.E.2d 274, 275–76 (1999)*; *Long v. Commonwealth, 23 Va. App. 537, 544–45, 478 S.E.2d 324, 327–28 (1996)*; *Smoot v. Commonwealth, 18 Va. App. 562, 566–67, 445 S.E.2d 688, 691 (1994)*; *Reed v. Commonwealth, 15 Va. App. 467, 471, 424 S.E.2d 718, 720–21 (1992)*; *Steed v. Commonwealth, 11 Va. App. 175, 179, 397 S.E.2d 281, 284 (1990)*; *Slaughter v. Commonwealth, 222 Va. 787, 794, 284 S.E.2d 824, 828 (1981)*; *Whorley v. Commonwealth, 215 Va. 740, 745–47, 214 S.E.2d 447, 450–52 (1975)*; *Triplett v. Commonwealth, 212 Va. 649, 651–52, 186 S.E.2d 16, 17–18 (1972)*.

Practice Commentary: For a discussion of the history of the habitual offender statute, see *Lilly, 50 Va. App. at 180–81, 647 S.E.2d at 520–21*. The Court of Appeals in *Lilly* upheld the constitutionality of the statute against a challenge based on the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, and the special laws prohibitions of the Constitution of Virginia. *Lilly, 50 Va. App. at 181–85, 647 S.E.2d at 521–23*.

Valid Predicate Offenses. A defendant cannot be convicted of operating a motor vehicle after having been found to be an habitual offender when the court which previously found the defendant to be an habitual offender in a civil proceeding under former Va. Code Ann. § 46.2-355 did not have jurisdiction over the defendant. *Slaughter, 222 Va. at 793–94, 284 S.E.2d at 827–28*.

An uncounseled misdemeanor conviction is not invalid per se and may serve as a valid predicate offense in declaration of habitual offender proceedings, and a subsequent conviction for driving after being declared an habitual offender is not erroneous. *McClure v. Commonwealth, 222 Va. 690, 694, 283 S.E.2d 224, 226 (1981)*. But see *Elkins v. Commonwealth, 30 Va. App. 460, 468–69, 517 S.E.2d 728, 732–33 (1999)* (holding an uncounseled misdemeanor conviction that resulted in imprisonment could not be used as a predicate offense for an habitual offender

second offense felony conviction).

Actual Notice. A defendant must receive actual notice of an habitual offender declaration before he can be convicted of driving after having been declared an habitual offender. *Hodges, 64 Va. App. at 692-93, 771 S.E.2d at 695-96; Bishop, 275 Va. at 13, 654 S.E.2d at 908; Reed, 15 Va. App. at 471, 424 S.E.2d at 720–21.* Actual notice may be proven by circumstantial evidence. *Yoder v. Commonwealth, 298 Va. 180, ___, 835 S.E.2d 897, 899 (2019).* Service by mail of an habitual offender declaration on a nonresident is sufficient notice if statutory requirements are met. *Steed, 11 Va. App. at 179, 397 S.E.2d at 284.* Additionally, a certificate of the Commissioner of the Department of Motor Vehicles showing notice of habitual offender adjudication is prima facia evidence that the required notification has been sent and delivered to the defendant. *Hodges, 64 Va. App. at 693, 771 S.E.2d at 696.*

DUI as Separate Act. Driving while intoxicated and driving while adjudged an habitual offender are separate acts for purposes of Va. Code Ann. § 19.2-294. *Slater v. Commonwealth, 15 Va. App. 593, 596, 425 S.E.2d 816, 818 (1993).*

☞ ***PRACTICE POINTER:***

To be found guilty, the defendant must have operated his motor vehicle or self-propelled machinery or equipment "on the highways of the Commonwealth." Va. Code Ann. § 46.2-357. For a discussion of what constitutes a "highway" for purposes of this statute, see *Mason v. Commonwealth, 64 Va. App. 292, 304–05, 767 S.E.2d 726, 732–33 (2015)* and *Seaborn, 54 Va. App. at 412–13, 679 S.E.2d at 567.* For a discussion of the broad definition of "self-propelled machinery or equipment" for the purposes of this statute, see *Saunders, 48 Va. App. at 202–04, 629 S.E.2d at 704–05.*

☞ ***PRACTICE POINTER:***

Under Va. Code Ann. § 46.2-360(1), the court may restore an habitual offender's privilege to operate a motor vehicle with or without conditions or issue a restricted license. The restoration of driving privileges subject to conditions does not terminate a driver's habitual offender status, and only upon satisfying the specified conditions is a driver's privilege to operate a motor vehicle restored in full and his status as an habitual offender removed. *Norman, 268 Va. at 547, 604 S.E.2d at 86.* If the court issues a restricted license instead of restoring the privilege with conditions, that restricted license will never mature into a full restoration of driving privileges. *Id.*; *Claytor v. Commonwealth, 62 Va. App. 644, 651–52, 751 S.E.2d 686, 689 (2013).*

☞ ***PRACTICE POINTER:***

The defendant bears the burden of showing that his license has been restored. *Sears, 29 Va. App. at 161–62, 510 S.E.2d at 275–76.*

☞ ***PRACTICE POINTER:***

A jury instruction lacking language as to the element of actual notice was held

erroneous in *Smoot, 18 Va. App. at 566–67, 445 S.E.2d at 691.*

☞ ***PRACTICE POINTER:***

The statute provides that no portion of any sentence for habitual offender misdemeanor shall be suspended, except that (i) if the sentence is more than ten (10) days in jail, any portion of the sentence in excess of ten (10) days may be suspended; or (ii) in cases where operation of the motor vehicle is necessitated in situations of apparent extreme emergency which requires such operation to save life or limb, part or all of the sentence may be suspended. Va. Code Ann. § 46.2-357(B)(1).

The statute likewise provides that no portion of any sentence for habitual offender felony shall be suspended, except that (i) if the sentence is more than one year in the state correctional facility, any portion of the sentence in excess of one year may be suspended; or (ii) in cases where operation of the motor vehicle is necessitated in situations of apparent extreme emergency which requires such operation to save life or limb, part or all of the sentence may be suspended. Va. Code Ann. § 46.2-357(B)(2).

The one-year, or twelve month, mandatory minimum period of incarceration required by Va. Code Ann. § 46.2-357(B)(2) and (3), with the consent of the defendant, can be served through participation in the Community Corrections Alternative Program, but electronic incarceration under Va. Code Ann. § 53.1-131.2 may not be employed as an alternative means of satisfying the mandatory minimum period of incarceration. Va. Code Ann. § 46.2-357(D); *Cuffee-Smith, 39 Va. App. at 483, 574 S.E.2d at 297.*

! ***ALERTS:***

• The fact that the defendant has obtained a valid driver's license from another state is not a defense where the defendant's right to drive in Virginia has not been restored. *Sink v. Commonwealth, 28 Va. App. 655, 659, 507 S.E.2d 670, 672 (1998).*

• The defense of necessity is not applicable in the guilt phase of habitual offender proceedings. *Long, 23 Va. App. at 544, 478 S.E.2d at 327.*

• An habitual offender order using the language of former Va. Code Ann. § 46.2-355 is sufficient to revoke defendant's driving privilege within the meaning contemplated by Va. Code Ann. § 46.2-357 even though the term "revoked" is not used. *Thomas, 59 Va. App. at 505, 720 S.E.2d at 162.*

• The language of the "Notes" appearing in the instruction should be deleted after the required modifications are made to the instruction language and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding" and "Motor Vehicles"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.8, 21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 121, 126.2

Instruction No. 31.210

Intoxication Alone Is Insufficient

Intoxication alone is insufficient to prove that the operation of a [motor vehicle; self-propelled machinery or equipment] **endangered the life, limb or property of another.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 46.2-357.

CASE AUTHORITY:

Thompson v. Commonwealth, 27 Va. App. 720, 723–25, 501 S.E.2d 438, 439–40 (1998); Bishop v. Commonwealth, 20 Va. App. 206, 210, 455 S.E.2d 765, 767 (1995); Lawrence v. Commonwealth, 20 Va. App. 653, 656–57, 460 S.E.2d 259, 260–61 (1995).

PRACTICE COMMENTARY: Evidence of intoxication, standing alone, is insufficient according to the decision in *Bishop* to prove dangerous operation. But the Court of Appeals also held in *Lawrence* that evidence of intoxication is admissible and may be considered in conjunction with evidence of the manner of operation. For further discussion of the factors that constitute dangerous driving under the "virtually identical" reckless driving statute, Va. Code Ann. § 46.2-852, see Practice Commentary to Instruction No. 45.100, Reckless Driving.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, *Criminal Offenses and Defenses in Virginia*, "Assault, Battery and Wounding" and "Motor Vehicles"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.8, 21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 121, 126.2

CHAPTER 32

HIT AND RUN

Scope Note

Instruction No. 32.100 **Hit and Run—Death, Personal Injury or Damage to Attended Property—Felony**

Instruction No. P32.100 **Hit and Run—Death, Personal Injury or Damage to Attended Property—Felony**

Instruction No. 32.200 **Hit and Run—Damage of $1000 or Less to Property—Misdemeanor**

Instruction No. P32.200 **Hit and Run—Damage of $1000 or Less to Property—Misdemeanor**

Instruction No. 32.300 **Involved in an Accident—Definition**

SCOPE NOTE

Va. Code Ann. § 46.2-894 establishes various duties of a driver of any vehicle in the event of an accident involving injury or death or damage to attended property. A person convicted of violating the enumerated duties is guilty of either a Class 5 felony or a Class 1 misdemeanor, depending upon whether injury, death or property damage of more than $1000 resulted. If it did, the offense is a felony. If there was no injury and the damage to the attended property was less than $1,000, the offense is a misdemeanor.

Separate instructions are offered, since the principal case, *Fontaine v. Commonwealth, 25 Va. App. 156, 164, 487 S.E.2d 241, 245 (1997)*, holding that the misdemeanor offense is not a lesser included offense of the felony, has not expressly been overruled on that point. However, there is some question whether *Fontaine* still controls the situation where the original charge alleged property damage in excess of $1000 because that opinion applied Va. Code Ann. § 46.2-900 and that code section was significantly amended by the General Assembly in 2001.

Instruction No. 32.100 pertains to the felony offense of hit and run where the accident resulted in injury to, or the death of, any person, or resulted in more than $1000 of damage to property.

Instruction No. 32.200 addresses the misdemeanor offense of hit and run resulting only in property damage $1000 or less.

Instruction No. 32.300 defines the meaning of the statutory phrase "involved in an accident."

Instructions are not offered for offenses set forth in Va. Code Ann. §§ 46.2-895 through 46.2-897. Va. Code Ann. § 46.2-896 imposes duties upon a driver involved in an accident causing damage to unattended property. Va. Code Ann. §§ 46.2-895 and 46.2-897 impose duties upon persons in the vehicle with the driver at the time of the accident to report specified information within 24 hours of the accident if the driver fails to perform the duties required by Va. Code Ann. §§ 46.2-894 or 46.2-896. A violation of the provisions of §§ 46.2-895 through 46.2-897 ranges from a Class 5 felony to a Class 4 misdemeanor depending upon the severity of the accident. Instruction Nos. 32.100 and 32.200 may be used as a guide for crafting an instruction in cases charging a violation of those statutes, based upon the elements and penalties set forth in the applicable statute and in Va. Code Ann. § 46.2-900.

The terms "attended property" and "unattended property" are not defined in the general definitions provision of Title 46.2 (Va. Code Ann. § 46.2-100), nor the statutes within Title 46.2 specifically dealing with accidents (Va. Code Ann. §§ 46.2-894 and 46.2-896). As undefined terms, they "must be given [their] ordinary meaning, given the context in which [they are] used." *Lawlor v. Commonwealth, 285 Va. 187, 237, 738 S.E.2d 847, 875 (2013)*; *see also Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007)* (same).

In addition to the penalties provided in Va. Code Ann. §§ 46.2-894 and 46.2-900, the court has discretion pursuant to Va. Code. Ann. § 46.2-901 to suspend the driver's license for any person convicted of violating the provisions of §§ 46.2-894 through 46.2-897. Pursuant to the provisions of Va. Code Ann. § 46.2-394, the court "shall" revoke for five years the driver's license of any person convicted four times of a violation of Va. Code Ann. §§ 46.2-894 or 46.2-895.

Instruction No. 32.100

Hit and Run—Death, Personal Injury or Damage to Attended Property—Felony

The defendant is charged with the crime of leaving the scene of an accident causing [personal injury; death; damage to attended property] [to; of] **another. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant was the driver of a vehicle which he knew was involved in an accident; and**

(2) **That the accident caused** [personal injury; death; damage to an attended vehicle or other attended property of more than $1000] [to; of] **another; and**

(3) **That the defendant knew, or should have known,** [that another person was injured by the accident; that another person was killed in the accident; that an attended vehicle or other attended property was damaged by the accident]; **and**

(4) **That the defendant failed to do any of the following:**

(a) **stop immediately as close to the scene of the accident as possible without obstructing traffic; or**

(b) **render reasonable assistance to any person injured in the accident; or**

(c) **report his name, address, driver's license number and vehicle registration number forthwith to the State Police or local law enforcement agency or to the person struck and injured if such person appeared to be capable of understanding and retaining the information, or to the driver or some other occupant of the vehicle collided with or the custodian of other damaged property.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P32.100

Hit and Run—Death, Personal Injury or Damage to Attended Property—Felony

You have found the defendant guilty of the crime of leaving the scene of an accident causing [personal injury; death; damage to attended property] **to another.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 46.2-894.

CASE AUTHORITY:

Butcher v. Commonwealth, ___ Va. ___, 838 S.E.2d 538 (2020); Cocke v. Commonwealth, 68 Va. App. 11, 14–17, 801 S.E.2d 427, 429–30 (2017); Smith v. Commonwealth, 66 Va. App. 382, 387–91, 785 S.E.2d 500, 502–04 (2016); Belew v. Commonwealth, 62 Va. App. 55, 63, 741 S.E.2d 800, 803–04 (2013); Payne v. Commonwealth, 277 Va. 531, 544–45, 674 S.E.2d 835, 841–42 (2009); Milazzo v. Commonwealth, 276 Va. 734, 738, 668 S.E.2d 158, 160 (2008); Brannon v. Commonwealth, 52 Va. App. 800, 804–06, 667 S.E.2d 841, 843–44 (2008); Robinson v. Commonwealth, 274 Va. 45, 53, 645 S.E.2d 470, 474 (2007); Neel v. Commonwealth, 49 Va. App. 389, 395, 641 S.E.2d 775, 777–78 (2007); O'Connell v. Commonwealth, 48 Va. App. 719, 732–33, 634 S.E.2d 379, 386 (2006); Tooke v. Commonwealth, 47 Va. App. 759, 765–68, 627 S.E.2d 533, 536–37 (2006); Edwards v. Commonwealth, 41 Va. App. 752, 768–70, 589 S.E.2d 444, 451–52 (2003); Cottee v. Commonwealth, 31 Va. App. 546, 557–58, 525 S.E.2d 25, 31 (2000); Fontaine v. Commonwealth, 25 Va. App. 156, 164, 487 S.E.2d 241, 245 (1997), overruled in part on other grounds by Edwards, 41 Va. App. at 765, 589 S.E.2d at 450; Eubanks v. Commonwealth, 18 Va. App. 537, 540–41, 445 S.E.2d 706, 708 (1994); Johnson v. Commonwealth, 14 Va. App. 769, 771–72, 418 S.E.2d 729, 730–31 (1992); Kil v. Commonwealth, 12 Va. App. 802, 809–13, 407 S.E.2d 674, 678–80 (1991); Smith v. Commonwealth, 8 Va. App. 109, 115, 379 S.E.2d 374, 377 (1989); Herchenbach v. Commonwealth, 185 Va. 217, 219–20, 38 S.E.2d 328, 329 (1946); Blankenship v. Commonwealth, 184 Va. 495, 500–01, 35 S.E.2d 760, 762–63 (1945); James v. Commonwealth, 178 Va. 28, 34–36, 16 S.E.2d 296, 298–99 (1941); Henson v. Commonwealth, 165 Va. 829, 833, 183 S.E. 438, 440 (1936).

PRACTICE COMMENTARY:

Purpose of Statutes. The gravamen of a charge for hit and run is the flight from the scene and failure to give aid and succor to the injured party or parties. *Blankenship, 184 Va. at 500, 35 S.E.2d at 762; James, 178 Va. at 37, 16 S.E.2d at 300.* Additional purposes include facilitating the investigation of the accident, preserving public order, and advancing public safety. *Johnson, 14 Va. App. at 771, 418 S.E.2d at 731.*

In *Milazzo*, the Supreme Court of Virginia agreed with the Court of Appeals' observation that the purpose of Code § 46.2-894 "is to prevent motorists involved in accidents from evading civil or criminal liability by leaving the scene of an accident and to require drivers involved in an accident to provide identification information and render assistance to injured parties." *276 Va. at 736-37, 668 S.E.2d at 159. See also Smith, 66 Va. App. at 388, 785 S.E.2d at 503.*

Injuries Preventing Compliance with Statutory Duties. Pursuant to the provi-

sions of Va. Code Ann. § 46.2-894, a driver who is prevented from complying with the duties imposed because of injuries sustained in the accident is permitted to do so "as soon as reasonably possible."

Therefore, under appropriate circumstances, Instruction No. 32.100 may be modified to include the following (or similar language):

However, if you find that the defendant failed to comply with the requirements identified in paragraphs (4)(a) through (4)(c) as soon as reasonably possible due to injury, but that compliance was achieved within a reasonable period after such time that the defendant's ability to comply was no longer impaired by such injury, you shall find the defendant not guilty.

Actual Knowledge of Accident Occurrence Required. Actual knowledge that an accident occurred is an essential element of the crime of "hit and run." *Tooke, 47 Va. App. at 766, 627 S.E.2d at 536.* In *Herchenbach, 185 Va. at 220–21, 38 S.E.2d at 329–30*, the Court focused on whether the driver knew that harm had been done and would not infer knowledge under circumstances (dense fog and the weight of a bus loaded with passengers and baggage) indicating that the bus might have passed over the body or head of the victim without significant jolt or jar. *185 Va. at 220–21, 38 S.E.2d at 329–30* (decided under 1942 version of the statute). Finding the evidence of actual knowledge insufficient, the Court reversed the defendant's conviction. *Id. at 221–23; 38 S.E.2d at 330.*

Actual or Constructive Knowledge of the Damage or Injury. In *Payne, 277 Va. at 545, 674 S.E.2d at 842*, the Court focused on whether the driver knew or should have known that harm had been done (driver "slammed" into the back of victim's car, causing the driver's glasses to fall down and leaving her sitting in her vehicle "dazed and lethargic"). Finding evidence the driver either knew or should have known of the victim's injury sufficient, the Court affirmed the driver's conviction. *Id. Brannon, 52 Va. App. at 806, 667 S.E.2d at 844* applies a reasonable man standard to the fact or extent of the injury.

Personal Injury/Property Damage Threshold. A soft-tissue injury such as muscle pain or damage is sufficient to prove an injury under Va. Code Ann. § 46.2-894. *Belew, 62 Va. App. at 63, 741 S.E.2d at 803–04.*

If the defendant is charged with causing damage of more than $1,000 to an attended vehicle, the proper method of assessing damage is the lesser of i) the difference in market value before and after the damage occurred, or; ii) the reasonable cost of repairs to restore the property to its former condition. Reasonable cost of repairs includes parts and labor. *Cocke, 68 Va. App. at 14–17, 801 S.E.2d at 428–30.*

Double Jeopardy; Units of Prosecution. Because the acts constituting the offense do not commence until after the injury or damages have been inflicted, it is not double jeopardy to convict a defendant for both hit and run and manslaughter arising out of the same occurrence. *Henson, 165 Va. at 833, 183 S.E. at 440.*

The statute does not include failure to stop and assist each person involved in a

single accident as separate crimes. *Tooke, 47 Va. App. at 765, 627 S.E.2d at 536.*

"Accident" and "Involved in an Accident" Defined. The term "accident" as used in Va. Code Ann. § 46.2-894 is not limited to unintentional incidents; the purpose of the statute is to protect persons injured as the result of, and to ensure the assessment of liability arising out of, an unfortunate vehicular event and it makes no difference whether the collision was intentional or unintentional. *Milazzo, 276 Va. at 737–38, 668 S.E.2d at 160.*

An "accident" occurs within the meaning of Va. Code Ann. § 46.2-894, and the statutory duties thereunder apply, when injuries to persons or property arise in connection with the operation of a motor vehicle, regardless of whether a collision has occurred or a person has been struck by the vehicle. *Smith, 8 Va. App. at 115, 379 S.E.2d at 377.*

For a driver of a vehicle to be "involved" in an accident" within the intendment of Va. Code Ann. § 46.2-894, there must be either (1) physical contact between the driver's vehicle and another vehicle, person or object, or (2) the driver of a motor vehicle must have been a proximate cause of an accident. *Robinson, 274 Va. at 53, 645 S.E.2d at 474.* See also Instructions No. 32.300, Involved in an Accident—Definition and No. 2.530, Definition of Proximate Cause.

Bifurcation. Va. Code Ann. § 46.2-943 permits a bifurcated trial in traffic offense cases with the traffic record being considered after a finding of guilt but before punishment.

Aiding and Abetting. The owner of an automobile may be convicted for aiding and abetting a hit and run where he allows his guest who is driving the car to drive away from the scene of an accident in which someone is killed; it is the owner's duty to control the operation of the car, and failure to perform this duty makes the owner a participant in the offense. *James, 178 Va. at 35, 16 S.E.2d at 299.*

Lesser-Included Offenses. Misdemeanor hit and run property damage in violation of Va. Code Ann. § 46.2-894 is not a lesser included offense of felony hit and run, personal injury. *Fontaine, 25 Va. App. at 164, 487 S.E.2d at 245, overruled in part on other grounds, Edwards, 41 Va. App. at 765, 589 S.E.2d at 450.* See *Butcher, 69 Va. App. at 409, 819 S.E. 2d at 863 n.1, vacated in part on other grounds, Butcher v. Commonwealth, ___ Va. ___, 838 S.E.2d 538 (2020)*, which may be in conflict with *Fontaine*. In *Butcher*, the defendant was charged with felony hit and run under Va. Code Ann. § 46.2-894. At the conclusion of the Commonwealth's evidence, the trial court granted the defendant's motion to strike the felony on the basis that the Commonwealth's evidence failed to establish there had been $1,000 or more in property damage. The trial court thereafter found the defendant guilty of misdemeanor hit and run. The only issue raised on appeal by the defendant was the sufficiency of the evidence that he failed to stop and exchange information. He does not appear to have challenged the trial court's decision to find him guilty of the misdemeanor despite having been charged with the felony. In its opinion, the Court of Appeals referred to the misdemeanor conviction as "the lesser-included misdemeanor" found in the statute.

Identification Requirement. Although Va. Code Ann. § 46.2-894 does not explicitly state that the driver must identify himself as the driver, the language and context of the statute logically imply such a requirement. *Smith, 66 Va. App. at 389, 785 S.E.2d at 503.*

Reporting Requirement. Element 4c of Instruction No. 32.100 sets forth that a violation of the reporting requirements is in the disjunctive. However, in *Butcher v. Commonwealth, ___ Va. ___, 838 S.E.2d 538 (2020)*, there was a split among the justices whether the reporting requirements are in the disjunctive or conjunctive. While the plurality opinion (joined by 3 justices) chose not to offer an answer to this interpretation issue; one concurring opinion (joined by 2 justices) concluded that the reporting requirements should be read in the disjunctive, another concurring opinion (joined by 2 justices) concluded that the reporting requirement should be read in the conjunctive, and a third concurring opinion (by a justice who also joined the first concurring opinion) explicitly called for clarification by the General Assembly.

ALERTS:

- Because of the number of variables covered in this instruction, it is especially important to tailor the instruction to fit the facts in evidence in each specific case.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Hit and Run" and "Motor Vehicles"

MICHIE'S JURISPRUDENCE, Automobiles § 124; and Constitutional Law § 141

• Because of the number of variables covered in this instruction, it is especially important to tailor the instruction to fit the facts in evidence in each specific case.

Instruction No. 32.200

Hit and Run—Damage of $1000 or Less to Property—Misdemeanor

The defendant is charged with the crime of leaving the scene of an accident causing damage to attended property. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was the driver of a vehicle which he knew was involved in an accident; and

(2) That the accident caused damage to an attended vehicle or other attended property of $1000 or less; and

(3) That the defendant knew, or should have known that an attended vehicle or other attended property was damaged by the accident; and

(4) That the defendant failed to do any of the following:

(a) stop immediately as close to the scene of the accident as possible without obstructing traffic; or

(b) report his name, address, driver's license number and vehicle registration number forthwith to the State Police or local law enforcement agency, or to the driver or some other occupant of the vehicle collided with or the custodian of other damaged property.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P32.200

Hit and Run—Damage of $1000 or Less to Property—Misdemeanor

You have found the defendant guilty of the crime of leaving the scene of an accident causing damage to attended property.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 46.2-894, 46.2-943, 19.2-295.1.

CASE AUTHORITY:

Butcher v. Commonwealth, 69 Va. App. 406, 415, 819 S.E. 2d 862, 866 (2018); Smith v. Commonwealth, 66 Va. App. 382, 387–91, 785 S.E.2d 500, 502–04 (2016); Milazzo v. Commonwealth, 276 Va. 734, 738, 668 S.E.2d 158, 160 (2008); Brannon v. Commonwealth, 52 Va. App. 800, 804–06, 667 S.E.2d 841, 843–44 (2008); Robinson v. Commonwealth, 274 Va. 45, 53, 645 S.E.2d 470, 474 (2007); Tooke v. Commonwealth, 47 Va. App. 759, 765–68, 627 S.E.2d 533, 536–37 (2006); Edwards v. Commonwealth, 41 Va. App. 752, 768–70, 589 S.E.2d 444, 451–52 (2003); Fontaine v. Commonwealth, 25 Va. App. 156, 164, 487 S.E.2d 241, 245 (1997), overruled in part on other grounds, Edwards, 41 Va. App. at 765, 589 S.E.2d at 450; Johnson v. Commonwealth, 14 Va. App. 769, 771–72, 418 S.E.2d 729, 730–31 (1992); Smith v. Commonwealth, 8 Va. App. 109, 115, 379 S.E.2d 374, 378 (1989); Herchenbach v. Commonwealth, 185 Va. 217, 219–20, 38 S.E.2d 328, 329 (1946); Henson v. Commonwealth, 165 Va. 829, 833, 183 S.E. 438, 440 (1936).

PRACTICE COMMENTARY:

Bifurcation. Va. Code Ann. § 46.2-943 permits a bifurcated trial in traffic offense cases with the traffic record being considered after a finding of guilt but before punishment.

Injuries Preventing Compliance with Statutory Duties. Pursuant to the provisions of Va. Code Ann. § 46.2-894, a driver who is prevented from complying with the duties imposed because of injuries sustained in the accident is permitted to do so "as soon as reasonably possible." Therefore, under appropriate circumstances Instruction No. 32.200 may be modified to include the following (or similar language):

> **However, if you find that the defendant failed to comply with the requirements identified in paragraphs (4)(a) and (4)(b) as soon as reasonably possible due to injury, but that compliance was achieved within a reasonable period after such time that the defendant's ability to comply was no longer impaired by such injury, you shall find the defendant not guilty.**

Lesser-Included Offenses. Misdemeanor hit and run property damage in violation of Va. Code Ann. § 46.2-894 is not a lesser included offense of felony hit and run, personal injury. *Fontaine, 25 Va. App. at 164, 487 S.E.2d at 245, overruled in part on other grounds, Edwards, 41 Va. App. at 765, 589 S.E.2d at 450.* See *Butcher, 69 Va. App. at 409, 819 S.E. 2d at 863 n.1*, which may be in conflict with *Fontaine.* In *Butcher*, the defendant was charged with felony hit and run under Va. Code Ann. § 46.2-894. At the conclusion of the Commonwealth's evidence, the trial court granted the defendant's motion to strike the felony on the basis that the Commonwealth's evidence failed to establish there had been $1,000 or more in property damage. The trial court thereafter found the defendant guilty of

misdemeanor hit and run. The only issue raised on appeal by the defendant was the sufficiency of the evidence that he failed to stop and exchange information. He does not appear to have challenged the trial court's decision to find him guilty of the misdemeanor despite having been charged with the felony. In its opinion, the Court of Appeals referred to the misdemeanor conviction as "the lesser-included misdemeanor" found in the statute.

For a discussion of other principles pertinent to this instruction, see Practice Commentary, Practice Pointers, and Alerts for Instruction No. 32.100.

***ALERTS*:**

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Hit and Run" and "Motor Vehicles"

MICHIE'S JURISPRUDENCE, Automobiles § 124; and Constitutional Law § 141

Instruction No. 32.300

Involved in an Accident—Definition

The driver of a vehicle has been involved in an accident if:

(a) There has been physical contact between the driver's vehicle and another vehicle, person or object; or

(b) The driver of the vehicle was a proximate cause of the accident

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 46.2-894.

CASE AUTHORITY:

Robinson v. Commonwealth, 274 Va. 45, 53, 645 S.E.2d 470, 474 (2007).

PRACTICE COMMENTARY: This instruction is based on the language of *Robinson v. Commonwealth* where the court rejected a broad construction of the word "involved" as contrary to the well-established principle that a penal statute must be strictly construed against the state and limited in application to cases falling clearly within its language. *Robinson, 274 Va. at 52, 645 S.E.2d at 473–74.* This instruction may be used in conjunction with Instructions No. 32.100 and 32.200 where there exists a question of whether the defendant was involved in the accident giving rise to the charge of hit and run.

PRACTICE POINTER:

For an instruction on proximate cause, see Instruction No. 2.530, Definition of Proximate Cause.

ALERTS:

Va. Code Ann. § 29.1-739 establishes various duties of an operator of a vessel involved in an accident. It contains different elements and language than Va. Code Ann. § 46.2-894. Violation of it is a Class 6 felony if the collision involves death or serious bodily injury. If the collision results only in property damage, it is a Class 1 misdemeanor. If it is an unattended vessel struck and damage is less than fifty dollars, the convicted party shall be punished only by a fine not exceeding $50. Separate instructions would be required tracking the specific elements of Va. Code Ann. § 29.1-739.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Hit and Run" and "Motor Vehicles"

MICHIE'S JURISPRUDENCE, Automobiles § 124; and Constitutional Law § 141

CHAPTER 33

HOMICIDE

Scope Note

Instruction No. 33.100 Aggravated Murder

Instruction No. P33.126 Aggravated Murder—Ineligibility for Parole

Instruction No. P33.130 Aggravated Murder

Instruction No. 33.200(a) First Degree Murder

Instruction No. 33.200(b) First Degree Felony Murder

Instruction No. P33.200 First Degree Murder

Instruction No. 33.205 "In the Commission of"—Definition for Aggravated Murder and First Degree Felony Murder

Instruction No. 33.220 Malice—Definition

Instruction No. 33.230 Malice—Murder and Manslaughter Distinguished

Instruction No. 33.240 Malice—Inference From Use of Deadly Weapon

Instruction No. 33.260 Willful, Deliberate, and Premeditated

Instruction No. 33.300 Inference of Second Degree Murder

Instruction No. 33.320 Second Degree Murder

Instruction No. P33.320 Second Degree Murder

Instruction No. 33.340 Second Degree Felony Homicide

Instruction No. P33.340 Second Degree Felony Homicide

Instruction No. 33.345 "In the Commission of"—Definition for Second Degree Felony Homicide

Instruction No. 33.400 Motive

Instruction No. 33.500 Voluntary Manslaughter

Instruction No. P33.500 Voluntary Manslaughter

Instruction No. 33.550 Words as Provocation

Instruction No. 33.600 Involuntary Manslaughter—General

Instruction No. P33.600 Involuntary Manslaughter—General

Instruction No. 33.610 Involuntary Manslaughter—Criminal Negligence—Definition

Instruction No. 33.650 Involuntary Manslaughter, Motor Vehicle—Under the Influence

Instruction No. P33.650 Involuntary Manslaughter, Motor Vehicle—Under the Influence

Instruction No. 33.660 Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence

Instruction No. P33.660 Aggravated Involuntary Manslaughter, Motor Vehicle—Under the

Influence

Instruction No. 33.700 Lesser Included Offenses

Instruction No. P33.700(a) Lesser Included Offenses—First Degree Murder

Instruction No. P33.700(b) Lesser Included Offenses—Second Degree Murder

Instruction No. P33.700(c) Lesser Included Offenses—Voluntary Manslaughter

Instruction No. 33.720 Doubt as to Grade of Offense

Instruction No. 33.800 Self-Defense—Defendant Without Fault

Instruction No. 33.810 Self-Defense—Defendant With Fault—Retreat to Wall

Instruction No. 33.850 Accidental Killing

Instruction No. 33.900 Transferred Intent—General

Instruction No. 33.910 Transferred Intent—Self-Defense

Instruction No. 33.950 Intent—Intoxication Defense

SCOPE NOTE

These instructions cover the principal crimes classified as homicide in Va. Code Ann. §§ 18.2-31 to 18.2-36.1.

Effective July 1, 2021, the death penalty in Virginia is abolished. Additionally, significant statutory revisions pertaining to sentencing became effective July 1, 2021. In murder cases, "[i]f a person indicted for murder be found by the jury guilty of any punishable homicide [the jury] shall in their verdict fix the degree thereof." Va. Code Ann. § 19.2-288. Unless the accused has requested that the jury ascertain his punishment by a written pleading filed at least 30 days prior to trial, as provided by Va. Code Ann. § 19.2-295(A), "[t]he court shall ascertain the extent of the punishment to be inflicted within the bounds prescribed by [Va. Code Ann.]§§ 18.2-30 to 18.2-36[.]" *Id.*

Instruction No. 33.100, based on Va. Code Ann. § 18.2-31, defines the elements of the substantive offense of aggravated murder. Aggravated murder is a Class 1 felony. The punishment for aggravated murder is set out in Instruction No. P33.130.

Several instructions cover the elements of first degree murder. Instruction Nos. 33.200(a) and 33.200(b) provide a general definition of first degree murder and of first degree felony murder for the jury, and are based primarily on Va. Code Ann. § 18.2-32. Instruction No. 33.205 defines when an act is in the commission of one of the predicate offenses for first degree felony murder. Instruction Nos. 33.220 and 33.230 deal with malice, while Instruction No. 33.240 is used when there is an inference of malice from the use of a deadly weapon. See Instruction No. 18.850 defining deadly weapon. Instruction No. 33.260 defines the meaning of willful, deliberate, and premeditated. When a defendant charged with first degree murder has at least twice previously been convicted of a specified felony act of violence, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

Instruction Nos. 33.300 and 33.320 relate to second degree murder. Instruction No. 33.300 deals with the inference that every unlawful killing is second degree murder. Instruction No. 33.320 covers the definition of second degree murder other than felony homicide, and it is based on Va. Code Ann. § 18.2-32. When a defendant charged with second degree murder has at least twice previously been convicted of a specified felony act of violence, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

Instruction No. 33.340, based on Va. Code Ann. § 18.2-33, covers second degree felony homicide. Instruction No. 33.345 defines when an act is performed in the commission of a felony other than aggravated murder or first degree felony murder for use in a second degree felony homicide prosecution.

Instruction No. 33.400 deals with the role that motive plays in homicide cases.

Instruction No. 33.500, based partially on Va. Code Ann. § 18.2-35, covers voluntary manslaughter. Instruction No. 33.550 sets forth the principle that words alone are not sufficient provocation to reduce a killing from murder to voluntary manslaughter. When a defendant charged with voluntary manslaughter has at least twice previously been convicted of a specified felony, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

Instruction No. 33.600, based partially on Va. Code Ann. § 18.2-36, covers involuntary manslaughter. Instruction No. 33.610 defines criminal negligence. Instruction No. 33.650, based on Va. Code Ann. § 18.2-36.1(A), deals with involuntary manslaughter committed when driving under the influence of alcohol, drugs or a combination of drugs and alcohol. Instruction No.

33.660, based on Va. Code Ann. § 18.2-36.1(B), covers aggravated involuntary manslaughter.

Instruction Nos. 33.700(a)-(c) are finding instructions for first degree murder and lesser included offenses. Instruction No. 33.720 pertains to resolving doubt as to grade or degree of homicide in favor of the defendant.

Instruction Nos. 33.800 and 33.810 cover self-defense. Instruction No. 33.800 pertains to situations where the defendant is not at fault in provoking the difficulty that leads to the killing. Instruction No. 33.810 pertains to the situation where the defendant has contributed to the difficulty and must, therefore, retreat to the wall in a good faith attempt to abandon the fight while making known his desire for peace.

Instruction No. 33.850 deals with the Commonwealth's burden of proof in cases where the defense is that the killing was an accident.

Instruction Nos. 33.900 and 33.910 deal with transferred intent. Instruction No. 33.900 provides a general definition of transferred intent, while Instruction No. 33.910 deals with transferred intent in cases of self-defense.

Instruction No. 33.950 covers the effect of voluntary drunkenness on the part of the defendant. The instruction is used in cases where deliberation and premeditation are elements of the offense. If the defendant was incapable of deliberating and premeditating due to significant intoxication, he may not be convicted of an offense containing those elements.

Instruction No. 33.100

Aggravated Murder

The defendant is charged with the crime of aggravated murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant killed** [(name of person; names of persons)]; **and**

(2) **That the** [killing was; killings were] **willful, deliberate and premeditated; and**

(3) **That the killing** [occurred in the commission of [robbery; attempted robbery]; occurred in the commission of abduction with the intent to extort money, or a pecuniary benefit, or with the intent to defile the victim of such an abduction; was for hire; was committed while defendant was confined in a [state; local] correctional facility; was committed while defendant was in the custody of an employee of a [state; local] correctional facility; was of a person in the commission of, or subsequent to, [rape; attempted rape; forcible sodomy; attempted forcible sodomy; object sexual penetration]; was of a law-enforcement officer and for the purpose of interfering with the performance of his official duties; occurred in the [commission; attempted commission] of (specify violation of Va. Code Ann. § 18.2-248) and for the purpose of furthering the [commission; attempted commission] of that violation; was pursuant to the direction or order of one then engaged in a continuing criminal enterprise; was of a pregnant woman by one who knew that the woman was pregnant and had the intent to cause the involuntary termination of the pregnancy without a live birth; was of a person under the age of fourteen by a person age twenty-one or older; was of more than one person as a part of the same act or transaction; was the willful, deliberate and premeditated killing of more than one person within a three-year period; was in the commission of or the attempted commission of an act of terrorism; was of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under Va. Code Ann. § 16.1-69.9:1 when the killing was for the purpose of interfering with his official duties as a judge; was of a witness in a criminal case after a subpoena had been issued for such witness by the court, the clerk, or an attorney when the killing was for the purpose of interfering with the person's duties in such case.]

[(3) That the killings occurred as a part of the same act or transaction.]

[(3) That the killings occurred within a three-year period.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [and shall not fix the punishment until your verdict has been returned and further evidence is heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of aggravated murder.

Note:

The instruction includes three different versions of element (3), corresponding to each of the statutory elements enumerated in Va. Code Ann. § 18.2-31. Only one version of element (3) should be used for each count of aggravated murder.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-31,19.2-288, 19.2-295, 19.2-295.1.

CASE AUTHORITY:

See discussion below.

PRACTICE COMMENTARY: Other instructions may be required in order to define the particular type of aggravated murder with which the defendant is being charged. Thus, for example, additional instructions might be necessary to define rape, a penal institution, the intent to extort, etc. The types of instructions that are needed will depend on the facts and circumstances of each case.

In an aggravated murder case, when a jury is instructed to determine whether the killing was willful, deliberate and premeditated, a separate instruction on malice is unnecessary. *Winston v. Commonwealth, 268 Va. 564, 601, 604 S.E.2d 21, 41–42 (2004); Mackall v. Commonwealth, 236 Va. 240, 254, 372 S.E.2d 759, 768 (1988).*

Specific Categories of Aggravated Murder. For convenience of counsel, cases relating to the specific categories of crimes enumerated in Va. Code Ann. § 18.2-31 as constituting aggravated murder are grouped below. These cases refer to "capital murder" instead of aggravated murder because they predate the 2021 statutory abolishment of the death penalty.

Commission of robbery: *Emmett v. Commonwealth, 264 Va. 364, 569 S.E.2d 39 (2002); Schmitt v. Commonwealth, 262 Va. 127, 547 S.E.2d 186 (2001); Yarbrough v. Commonwealth, 262 Va. 388, 551 S.E.2d 306 (2001); Joseph v. Commonwealth, 249 Va. 78, 452 S.E.2d 862 (1995); Graham v. Commonwealth, 250 Va. 79, 459 S.E.2d 97 (1995); Graham v. Commonwealth, 250 Va. 487, 464 S.E.2d 128 (1995); Tross v. Commonwealth, 21 Va. App. 362, 464 S.E.2d 523 (1995); Swann v. Commonwealth, 247 Va. 222, 441 S.E.2d 195 (1994); Chichester v. Commonwealth, 248 Va. 311, 448 S.E.2d 638 (1994); Cardwell v. Commonwealth, 248 Va. 501, 450 S.E.2d 146 (1994); Williams v. Commonwealth, 248 Va. 528, 450 S.E.2d 365 (1994); King v. Commonwealth, 243 Va. 353, 416 S.E.2d 669 (1992); Jenkins v. Commonwealth, 244 Va. 445, 457–58, 423 S.E.2d 360, 368 (1992); Yeatts v. Commonwealth, 242 Va. 121, 139–41, 410 S.E.2d 254, 266 (1991); Hoke v. Commonwealth, 237 Va. 303, 315–16, 377 S.E.2d 595, 602–03 (1989); Bennett v. Commonwealth, 236 Va. 448, 374 S.E.2d 303 (1988); Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987); Pope v. Commonwealth, 234 Va. 114, 360 S.E.2d 352 (1987); Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (1987); Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985); Wise v. Commonwealth, 230 Va. 322, 337 S.E.2d 715 (1985); Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984); Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520 (1983); Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271 (1983); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983); Clanton v. Commonwealth, 223 Va. 41, 286*

S.E.2d 172 (1982); Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162 (1982); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981); Briley (Linwood) v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); Briley (James) v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979); Harrison v. Commonwealth, 220 Va. 188, 257 S.E.2d 777 (1979); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979).

If robbery is the motive for the killing, the fact that the robbery occurs after the killing does not keep the homicide from being aggravated murder. See *Tibbs v. Commonwealth, 31 Va. App. 687, 698, 525 S.E.2d 579, 594 (2000); Whitley, 223 Va. at 72–74, 286 S.E.2d at 165–67.*

Commission of attempted robbery: Va. Code Ann. § 18.2-31(4) provides that a premeditated killing occurring in the commission of an attempted robbery is aggravated murder.

Commission of rape: *Lawlor v. Commonwealth, 285 Va. 187, 738 S.E.2d 847 (2013); Crawford v. Commonwealth, 281 Va. 84, 107–10, 704 S.E.2d 107, 121–23 (2011); Prieto v. Commonwealth, 278 Va. 366, 682 S.E.2d 910 (2009); Jackson v. Commonwealth, 267 Va. 178, 590 S.E.2d 520 (2004); Morrisette v. Commonwealth, 264 Va. 386, 569 S.E.2d 47 (2002); Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (2001); Powell v. Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001); Patterson v. Commonwealth, 262 Va. 301, 551 S.E.2d 332 (2001); Williams v. Commonwealth, 248 Va. 528, 450 S.E.2d 365 (1994); Beavers v. Commonwealth, 245 Va. 268, 427 S.E.2d 411 (1993); Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993); Satcher v. Commonwealth, 244 Va. 220, 421 S.E.2d 821 (1992); Rogers v. Commonwealth, 242 Va. 307, 410 S.E.2d 621 (1991); O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988); Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984); Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984); Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983)* (approving an instruction given to the jury that it was immaterial whether the alleged rape occurred before or after the death of the victim); *Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Keil v. Commonwealth, 222 Va. 99, 278 S.E.2d 826 (1981); Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981); Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980); Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980); Briley (James) v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).*

Commission of attempted rape: *Powell v. Commonwealth, 267 Va. 107, 590 S.E.2d 537 (2004); Wilson v. Commonwealth, 249 Va. 95, 452 S.E.2d 669 (1995);*

Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994).

Commission of more than one murder within a three-year period: *Severance v. Commonwealth, 295 Va. 564, 816 S.E.2d 277 (2018); Morva v. Commonwealth, 278 Va. 329, 683 S.E.2d 553 (2009); Muhammad v. Commonwealth, 269 Va. 451, 619 S.E.2d 16 (2005); Commonwealth v. Smith, 263 Va. 13, 557 S.E.2d 223 (2002); Burlile v. Commonwealth, 261 Va. 501, 544 S.E.2d 360 (2001); Walker v. Commonwealth, 258 Va. 54, 515 S.E.2d 565 (1999).*

Double jeopardy and multiple killings: Double jeopardy precludes separate punishments for the same murders under the distinct statutory predicates of commission of more than one murder within a three-year period and killing more than one person as part of the same act. *Andrews v. Commonwealth, 280 Va. 231, 287–88, 699 S.E.2d 237, 269–70 (2010).* Therefore, if the Commonwealth obtains convictions on both predicates of commission of more than one murder within a three-year period and killing more than one person as part of the same act, "it must elect which indictment it will proceed upon in the penalty determination phase of the trial." *Id.* However, double jeopardy does not preclude separate punishments for different murders within a three-year period when the predicate for the first charge is the later killing and the predicate for the second charge is the earlier killing. *Severance, 295 Va. at 575–76, 816 S.E.2d at 282–83.* In addition, there can be multiple punishments for the same killing when the predicate felonies are different. *Winston, 268 Va. at 614–15, 604 S.E.2d at 49; Payne, 257 Va. at 227–29, 509 S.E.2d at 300–01.*

Law enforcement officer: *Morva v. Commonwealth, 278 Va. 329, 683 S.E.2d 553 (2009); Porter v. Commonwealth, 276 Va. 203, 661 S.E.2d 415 (2008); Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695 (2002); Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994); Smith v. Commonwealth, 239 Va. 243, 389 S.E.2d 871 (1990); Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990); Delong v. Commonwealth, 234 Va. 357, 362 S.E.2d 669 (1987); Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).*

The "purpose of interfering" element required in killings of law enforcement officers equates with intent, not motive. *Martin, 221 Va. at 447–48, 271 S.E.2d at 130–31.* The Commonwealth does not have to prove motive. *Id.*

For hire: *Teleguz v. Commonwealth, 273 Va. 458, 643 S.E.2d 708 (2007); Wolfe v. Commonwealth, 265 Va. 193, 576 S.E.2d 471 (2003); Murphy v. Commonwealth, 246 Va. 136, 431 S.E.2d 48 (1993); Harris v. Commonwealth, 8 Va. App. 424, 382 S.E.2d 292 (1989); Fisher v. Commonwealth, 236 Va. 403, 374 S.E.2d 46 (1988); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984).*

Abduction: *Lawlor v. Commonwealth, 285 Va. 187, 738 S.E.2d 847 (2013); Prieto v. Commonwealth, 278 Va. 366, 682 S.E.2d 910 (2009); Cardwell v. Commonwealth, 248 Va. 501, 450 S.E.2d 146 (1994); Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991); Hoke v. Commonwealth, 237 Va. 303, 311, 377 S.E.2d 595, 600 (1989)* (concluding that restraint greater than that intrinsic to such

crimes as robbery or rape is required to constitute abduction).

By prisoner: *Morva v. Commonwealth, 278 Va. 329, 683 S.E.2d 553 (2009); Remington v. Commonwealth, 262 Va. 333, 551 S.E.2d 620 (2001); Lenz v. Commonwealth, 261 Va. 451, 544 S.E.2d 299 (2001); Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990); Payne v. Commonwealth, 233 Va. 460, 357 S.E.2d 500 (1987).*

More than one person—same act: *Prieto v. Commonwealth, 278 Va. 366, 682 S.E.2d 910 (2009); Elliott v. Commonwealth, 267 Va. 396, 593 S.E.2d 270 (2004); Winston v. Commonwealth, 268 Va. 564, 604 S.E.2d 21 (2004); Zirkle v. Commonwealth, 262 Va. 320, 551 S.E.2d 601 (2001); Graham v. Commonwealth, 250 Va. 487, 464 S.E.2d 128 (1995); Burket v. Commonwealth, 248 Va. 596, 450 S.E.2d 124 (1994); Williams v. Commonwealth, 248 Va. 528, 450 S.E.2d 365 (1994); Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394 (1993); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606 (1992); Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989); Woodfin v. Commonwealth, 236 Va. 89, 372 S.E.2d 377 (1988); Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196 (1987); Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984); Morris v. Commonwealth, 228 Va. 206, 321 S.E.2d 633 (1984).*

Double jeopardy and multiple killings: Double jeopardy precludes separate punishments for the same murders under the distinct statutory predicates of commission of more than one murder within a three-year period and killing more than one person as part of the same act. *Andrews, 280 Va. at 287–88, 699 S.E.2d at 269–70.* Therefore, if the Commonwealth obtains convictions on both predicates of commission of more than one murder within a three-year period and killing more than one person as part of the same act, "it must elect which indictment it will proceed upon in the penalty determination phase of the trial." *Id.* There can, however be multiple punishments for the same killing when the predicate felonies are different. *Winston, 268 Va. at 614–15, 604 S.E.2d at 49; Payne, 257 Va. at 227–29, 509 S.E.2d at 300–01.*

Act of Terrorism: *Muhammad v. Commonwealth, 269 Va. 451, 619 S.E.2d 16 (2005).*

Capital murder cases predating the 2021 abolishment of the death penalty, in which other significant issues have been discussed by the court include:

Killing of a person under the age of fourteen: *Gray v. Commonwealth, 274 Va. 290, 645 S.E.2d 448 (2007).*

Constitutionality: *Prieto v. Commonwealth, 278 Va. 366, 682 S.E.2d 910 (2009); Thomas v. Commonwealth, 263 Va. 216, 559 S.E.2d 652 (2002); Morrisette v. Commonwealth, 264 Va. 386, 569 S.E.2d 47 (2002); Powell v. Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001); Lenz v. Commonwealth, 261 Va. 451, 544 S.E.2d 299 (2001); Remington v. Commonwealth, 262 Va. 333, 551 S.E.2d 620 (2001); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983); Whitley v.*

Commonwealth, 223 Va. 66, 286 S.E.2d 162 (1982); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Briley (James) v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).

Voir dire: *Morva v. Commonwealth, 278 Va. 329, 683 S.E.2d 553 (2009); Jackson v. Commonwealth, 267 Va. 178, 590 S.E.2d 520 (2004); Wolfe v. Commonwealth, 265 Va. 193, 576 S.E.2d 471 (2003); Bell v. Commonwealth, 264 Va. 172, 563 S.E.2d 695 (2002); Green v. Commonwealth, 262 Va. 105, 546 S.E.2d 446 (2001); Schmitt v. Commonwealth, 262 Va. 127, 547 S.E.2d 186 (2001); Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872 (2001); Powell v. Commonwealth, 261 Va. 512, 552 S.E.2d 344 (2001); Remington v. Commonwealth, 262 Va. 333, 551 S.E.2d 620 (2001); Graham v. Commonwealth, 250 Va. 487, 464 S.E.2d 128 (1995); Tross v. Commonwealth, 21 Va. App. 362, 464 S.E.2d 523 (1995); Satcher v. Commonwealth, 244 Va. 220, 421 S.E.2d 821 (1992); Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992); Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985); Wise v. Commonwealth, 230 Va. 322, 337 S.E.2d 715 (1985); Clozza v. Commonwealth, 228 Va. 124, 321 S.E.2d 273 (1984); Tuggle v. Commonwealth, 228 Va. 493, 323 S.E.2d 539 (1984); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983); Justus, v. Commonwealth 222 Va. 667, 283 S.E.2d 905 (1981); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981); Justus v. Commonwealth, 220 Va. 971, 266 S.E.2d 87 (1980); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).*

Change of venue or venire: *Thomas v. Commonwealth, 263 Va. 216, 559 S.E.2d 652 (2002); Swisher v. Commonwealth, 256 Va. 471, 506 S.E.2d 763 (1998); Graham v. Commonwealth, 250 Va. 487, 464 S.E.2d 128 (1995); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606 (1992); Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983); Coleman v. Commonwealth, 226 Va. 31, 307 S.E.2d 864 (1983); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982); Fitzgerald v. Commonwealth, 223 Va. 615, 292 S.E.2d 798 (1982); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981); Briley (Linwood) v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980); Briley (James) v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978).*

Jury sequestration: *Pope v. Commonwealth, 234 Va. 114, 121, 360 S.E.2d 352,*

357 (1987); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371 (1984); Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984); Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980).

☞ ***PRACTICE POINTER:***

Instructions on lesser included offenses may be given in addition to the aggravated murder instruction where there is evidence to support the requested instruction. *Justus, 222 Va. at 678–79, 283 S.E.2d at 911.* Solicitation to commit murder is not a lesser included offense of attempted capital murder for hire, and the two offenses are not the "same offense" for purposes of double jeopardy. *Ostrander v. Commonwealth, 51 Va. App. 386, 395–97, 658 S.E.2d 346, 350–51 (2008).* Where there was no evidence that the defendant acted without premeditation, there was no error in the trial court's refusal to instruct the jury on second degree murder. *Porter, 276 Va. at 241–43, 661 S.E.2d at 434–35*; *Bunch, 225 Va. at 440–41, 304 S.E.2d at 281.* See also *Orbe v. Commonwealth, 258 Va. 390, 398–99, 519 S.E.2d 808, 813 (1999)* (holding that the trial court's refusal to instruct on first-degree murder, second degree murder, or voluntary manslaughter was proper where the record did not contain a "scintilla of evidence" that defendant acted without premeditation); *LeVasseur, 225 Va. at 589–92, 304 S.E.2d at 657–59* (finding that the trial court correctly refused to give the jury a second degree murder instruction).

☞ ***PRACTICE POINTER:***

An accessory before the fact or principal in the second degree to an aggravated murder may be charged and tried as though the offense were murder in the first degree except that he may be charged with aggravated murder in the cases of killing for hire, killing at the direction of a person engaged in a continuing criminal enterprise, or killing by order of one engaged in the commission of or attempted commission of an act of terrorism. Va. Code Ann. § 18.2-18; *Tice v. Commonwealth, 38 Va. App. 332, 339–40, 563 S.E.2d 412, 416–17 (2002); Johnson, 220 Va. at 149–50, 255 S.E.2d at 527; Coppola, 220 Va. at 256–57, 257 S.E.2d at 806–07.*

☞ ***PRACTICE POINTER:***

Joint participants may be tried as principals in the first degree. *Muhammad, 269 Va. at 482–85, 619 S.E.2d at 33–35; Strickler, 241 Va. at 493–95, 404 S.E.2d at 234–35.*

☞ ***PRACTICE POINTER:***

A defendant can be convicted of aggravated murder when he is the actual premeditated slayer of one victim and is an accessory before the fact or principal in the second degree to the premeditated slaying of another victim as part of the same act or transaction. *Burlile, 261 Va. at 510–11, 544 S.E.2d at 365; Graham,*

250 Va. at 491–92, 464 S.E.2d at 130.

☞ ***PRACTICE POINTER:***

When the Commonwealth seeks an aggravated murder conviction under Va. Code Ann. § 18.2-31(8) (the killing of more than one person within a three-year period), the trial court has the discretion to join the aggravated murder and the unrelated predicate murder for trial before the same jury. *Smith, 263 Va. 13, 557 S.E.2d 223.*

☞ ***PRACTICE POINTER:***

A charge of attempted aggravated murder requires proof of a specific intent to kill the victim. *Baldwin v. Commonwealth, 274 Va. 276, 280, 645 S.E.2d 433, 435 (2007)*; *Jordan v. Commonwealth, 50 Va. App. 322, 327, 649 S.E.2d 709, 712 (2007).* Although the jury must be instructed that the Commonwealth must prove a specific intent to kill, this element is not required to be included in the finding instruction. *Jordan, 50 Va. App. at 328, 649 S.E.2d at 712–13.* It is sufficient if it is contained in the definition of "[w]illful, deliberate, and premeditated" found in Instruction No. 33.260. *Jordan, 50 Va. App. at 327–28, 649 S.E.2d at 713.* Instruction No. 8.100, Attempt—General Elements provides the general format for an attempt instruction.

ALERTS:

• The language of the "Note" appearing in the instruction should be deleted after any required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. P33.126

Aggravated Murder—Ineligibility for Parole

The words "imprisonment for life" mean imprisonment for life without possibility of parole.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 53.1-165.1.

CASE AUTHORITY:

Wolfe v. Commonwealth, 265 Va. 193, 218–21, 576 S.E.2d 471, 486–87 (2003); *Bell v. Commonwealth, 264 Va. 172, 208, 563 S.E.2d 695, 718 (2002)*; *Burns v. Commonwealth, 261 Va. 307, 338–40, 541 S.E.2d 872, 892–94 (2001)*; *Yarbrough v. Commonwealth, 258 Va. 347, 374, 519 S.E.2d 602, 616 (1999)*; *Simmons v. South Carolina, 512 U.S. 154, 164–71 (1994).*

PRACTICE COMMENTARY: A trial court correctly responds to a jury question about ways to be released from prison, other than parole (such as clemency), by telling the jury to rely on the evidence and the instructions already presented. *Bell, 264 Va. at 208, 563 S.E.2d at 718*. When the jury asks the court to define "life," the court should tell the jury to rely on the evidence and the instructions. *Wolfe, 265 Va. at 218–21, 576 S.E.2d at 486–87.*

ALERTS:

• A Class 1 felony life imprisonment sentence is subject to the judicial power of suspension, except in the case of the aggravated murder of a law enforcement officer. Jones v. Commonwealth, 293 Va. 29, 795 S.E.2d 705 (2017); Va Code Ann. § 18.2-31(A)(6).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 63.3

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. P33.130

Aggravated Murder

You have found the defendant guilty of the crime of aggravated murder.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount but not more than $100,000.00.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-10(a).

Instruction No. 33.200(a)

First Degree Murder

The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant killed** (name of person); **and**

(2) **That the killing was malicious; and**

(3) **That the killing** [was willful, deliberate and premeditated; occurred by poison; occurred by lying in wait; occurred by imprisonment; occurred by starving].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of first degree murder.

Instruction No. 33.200(b)

First Degree Felony Murder

The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant killed** (name of person); **and**

(2) **That the killing** [occurred in the commission of, or attempt to commit, rape, arson, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction] **as that crime is separately defined.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of first degree murder.

Instruction No. P33.200

First Degree Murder

You have found the defendant guilty of the crime of first degree murder.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000; or

(3) A specific term of imprisonment, but not less than twenty (20) years; or

(4) A specific term of imprisonment, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-32.

CASE AUTHORITY:

Tisdale v. Commonwealth, 65 Va. App 478, 482–85, 778 S.E.2d 554, 556–57 (2015); Turner v. Commonwealth, 282 Va. 227, 250, 717 S.E.2d 111, 123 (2011); Kirby v. Commonwealth, 50 Va. App. 691, 700, 653 S.E.2d 600, 604 (2007); Kennemore v. Commonwealth, 50 Va. App. 703, 710–11, 653 S.E.2d 606, 609–10 (2007); Knight v. Commonwealth, 41 Va. App. 617, 622–28, 587 S.E.2d 736, 738–41 (2003); Proctor v. Commonwealth, 40 Va. App. 233, 245, 578 S.E.2d 822, 828 (2003); Helmick v. Commonwealth, 38 Va. App. 558, 567–69, 567 S.E.2d 551, 556–57 (2002); Arnold v. Commonwealth, 37 Va. App. 781, 789–91, 560 S.E.2d 915, 919-20 (2002); Remington v. Commonwealth 262 Va. 333, 352, 551 S.E.2d 620, 632 (2001); Commonwealth v. Jenkins, 255 Va. 516, 521, 499 S.E.2d 263, 265–66 (1998); Berkeley v. Commonwealth, 19 Va. App. 279, 286, 451 S.E.2d 41, 45 (1994); Spain v. Commonwealth, 7 Va. App. 385, 394, 373 S.E.2d 728, 733 (1988); Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981); Simpson v. Commonwealth, 221 Va. 109, 114–16, 267 S.E.2d 134, 139–40 (1980); Haskell v. Commonwealth, 218 Va. 1033, 1042–43, 243 S.E.2d 477, 482-83 (1978); McDaniel v. Commonwealth, 77 Va. 281, 284–88 (1883); M'Whirt's Case, 44 Va. (3 Gratt.) 594, 604–12 (1846); Commonwealth v. Jones, 28 Va. (1 Leigh) 598, 610–14 (1829); Whiteford v. Commonwealth, 27 Va. (6 Rand.) 721, 723–25 (1828).

PRACTICE COMMENTARY: At common law, a person was guilty of murder when he or she unlawfully killed another human being with malice aforethought, either express or implied. *Whiteford, 27 Va. (6 Rand.) at 723.*

Malice is the criterion that distinguishes murder from other killings. *M'Whirt's Case, 44 Va. (3 Gratt.) at 604–05*; *Wooden, 222 Va. at 762, 284 S.E.2d at 814.*

Degrees of murder did not exist at common law. By statute, the Virginia General Assembly has created various categories of homicide and degrees of murder. See, e.g., Va. Code Ann. § 18.2-31 (aggravated murder); Va. Code Ann. § 18.2-32 (first and second degree murder); Va. Code Ann. § 18.2-32.1 (murder of pregnant women); Va. Code Ann. § 18.2-32.2 (killing a fetus); Va. Code Ann. § 18.2-33 (felony homicide); Va. Code Ann. § 18.2-40 (lynching deemed murder).

Instruction No. 33.200(a)—First Degree Murder: Three categories of first degree murder are established in Va. Code Ann. § 18.2-32: (1) murder, other than aggravated murder, by any one or more of four enumerated means (poison, lying in wait, imprisonment, or starving); (2) murder by any willful, deliberate and premeditated killing; and (3) murder in the commission of, or attempt to commit, any one or more specific felony offenses (arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary, or abduction, except as provided in Va. Code Ann. § 18.2-31). Instruction No. 33.200(a) is applicable to the first two categories. Instruction No. 33.200(b), First Degree Felony Murder is

applicable to the third category.

Malice is defined and discussed in Instruction Nos. 33.220, Malice—Definition and 33.230, Malice—Murder and Manslaughter Distinguished.

To premeditate means to adopt a specific intent to kill. *Smith, 220 Va. at 700, 261 S.E.2d at 553.* The intent to kill must come into existence at some time prior to the killing but need not exist for any particular length of time. *Remington, 262 Va. at 352, 551 S.E.2d at 632; Smith, 220 Va. at 700, 261 S.E.2d at 553; Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980).* Intent to kill may be formed at the moment of the commission of the unlawful act. *Jackson v. Virginia, 443 U.S. 307, 324 (1979) (citing Commonwealth v. Brown, 90 Va. 671, 19 S.E 447 (1894)).* A design to kill may be formed only a moment before the fatal act is committed, provided the defendant had time to think and did intend to kill. *Giarratano, 220 Va. at 1074, 266 S.E.2d at 100.* See also Instruction No. 33.260.

A person who has voluntarily become so intoxicated as to be unable to deliberate and premeditate cannot commit a willful, deliberate and premeditated killing, but mere intoxication from drugs or alcohol will not negate premeditation. *Giarratano, 220 Va. at 1073, 266 S.E.2d at 99*; *Proctor, 40 Va. App. at 245, 578 S.E.2d at 828.* See also Instruction No. 33.950.

Premeditation is not an element of first degree murder by lying in wait. *Tisdale, 65 Va. App. at 484–85, 778 S.E.2d at 557.* Thus, "evidence of voluntary intoxication as a defense to premeditation is irrelevant to a charge of murder by lying in wait because the Commonwealth was not required to prove premeditation." *Id. at 484, 778 S.E.2d at 557.* At Tisdale's trial for murder by lying in wait, the court correctly granted the Commonwealth's motion *in limine* to exclude evidence of Tisdale's voluntary intoxication. *Id. at 485, 778 S.E.2d at 557.*

"An intervening event, even if a cause of the death, does not exempt the defendant from liability if that event was put into operation by the defendant's initial criminal acts." *Jenkins, 255 Va. at 521, 499 S.E.2d at 265–66.*

Instruction No. 33.200(b)—First Degree Felony Murder: First degree felony murder occurs in the commission of or attempt to commit rape, arson, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction. Va. Code Ann. § 18.2-32. All other felony murders are punishable under Va. Code Ann. § 18.2-33. See Instruction No. 33.340 as to second degree felony homicide. Thus, when the Commonwealth's case is based on killing in the commission or attempted commission of one of the felonies listed in Va. Code Ann. § 18.2-32, proof of the felony or attempt serves two functions: first, it makes the killing a murder; second, it elevates the killing from second degree to first degree murder. It is not necessary to instruct that malice is an independent element of first degree felony murder. *Haskell, 218 Va. at 1042–43 n.4, 243 S.E.2d at 482–83 n.4.*

"[T]he felony-murder statute applies where the killing is so closely related to the felony in time, place, and causal connection as to make it a part of the same criminal enterprise." *Kennemore, 50 Va. App. at 710–11, 653 S.E.2d at 609–10*;

Haskell, 218 Va. at 1043–44, 243 S.E.2d at 483.

The felony homicide statute is an application of common law murder principles, requiring a malice inquiry, not new substantive law under which any felony, without regard to its inherent dangerousness or dangerous way in which it is carried out, may be a predicate for felony homicide. The doctrine of res gestae provides an additional limitation on what offenses may serve as predicate for felony homicide convictions.

In essence, the res gestae rule requires that there be a connection between the predicate felony and the death, giving effect to the statutory requirement that the death occur "while in the prosecution of" the underlying felony. *Flanders v. Commonwealth, 298 Va. 345, 359, 838 S.E.2d 51, 59–60 (2020).*

An unintentional killing during a robbery or an attempted robbery is murder of the first degree. *Ball v. Commonwealth, 221 Va. 754, 757, 273 S.E.2d 790, 792 (1981).* But Va. Code Ann. § 18.2-31 provides that a premeditated killing occurring in the commission of robbery or attempted robbery is capital murder.

A person cannot be punished for both felony first-degree murder and second-degree murder for killing the same individual. *Holley v. Commonwealth, 64 Va. App. 156, 158, 765 S.E.2d 873, 874 (2014).* Where a person is convicted in a single trial for both, the court must vacate the conviction for second-degree murder. *Id. at 166–67, 765 S.E.2d at 877–78.*

It is not necessary that the wound, injury or trauma be the direct cause of death. *Spain, 7 Va. App. at 394, 373 S.E.2d at 733.* "[I]t is sufficient if the initial wound, injury or trauma causes death indirectly through a chain of natural causes." *Id.*

☞ ***PRACTICE POINTER*:**

A separate instruction should be prepared that defines the felony that was being committed.

☞ ***PRACTICE POINTER*:**

Where first and second degree murder are possible verdicts, it is error to fail to instruct the jury that every unlawful homicide may be inferred to be murder in the second degree. *Pannill v. Commonwealth, 185 Va. 244, 256–57, 38 S.E.2d 457, 463 (1946).* See also Instruction No. 33.300, Inference of Second Degree Murder.

☞ ***PRACTICE POINTER*:**

There can be no conviction for attempted murder without proof of a specific intent to kill. *Goodson v. Commonwealth, 22 Va. App. 61, 72, 467 S.E.2d 848, 854 (1996).* Thus, the crime of attempted felony murder does not exist. *Id. at 75, 467 S.E.2d at 855.*

The mental state required for attempted murder is the intent to kill a human being, not a particular human being. *Secret v. Commonwealth, 296 Va. 204, 227–31, 819 S.E.2d 234, 247–50 (2018)* (the natural and probable consequence of

an arson of a dwelling would kill all its occupants, whomever they happened to be).

ALERTS:

• When the Commonwealth's case is based on premeditation or one of the enumerated means (poison, lying in wait, imprisonment or starvation), Instruction No. 33.200(a), First Degree Murder should be used. When the Commonwealth's case is based on killing in the commission or attempted commission of one of the felonies listed in Va. Code Ann. § 18.2-32, Instruction No. 33.200(b), First Degree Felony Murder should be used. In either case, Instruction P33.200 is the appropriate penalty instruction.

• Va. Code Ann. § 18.2-32.2 makes the unlawful, willful, deliberate, malicious and premeditated killing of the fetus of another a Class 2 felony.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide".

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.205

"In the Commission of"—Definition for Aggravated Murder and First Degree Felony Murder

You are instructed that a killing is in the commission of (the predicate offense) if it is so related in time, place and causal connection as to make it part of the same criminal undertaking or enterprise. This can occur before, during or after the (predicate offense).

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-31, 18.2-32.

CASE AUTHORITY:

Turner v. Commonwealth, 282 Va. 227, 250, 717 S.E.2d 111, 123 (2011); *Kennemore v. Commonwealth, 50 Va. App. 703, 710–11, 653 S.E.2d 606, 609–10 (2007)*; *Powell v. Commonwealth, 261 Va. 512, 542–44, 552 S.E.2d 344, 361–63 (2001)*; *Berkeley v. Commonwealth, 19 Va. App. 279, 286, 451 S.E.2d 41, 45 (1994)*; *Pope v. Commonwealth, 234 Va. 114, 125, 360 S.E.2d 352, 359 (1987)*; *Briley (Linwood) v. Commonwealth, 221 Va. 532, 543–44, 273 S.E.2d 48, 55–56 (1980)*; *Haskell v. Commonwealth, 218 Va. 1033, 1043–44, 243 S.E.2d 477, 483 (1978).*

PRACTICE COMMENTARY: This instruction can be used when the defendant is charged with aggravated murder, Va. Code Ann. § 18.2-31, or first degree felony murder, Va. Code Ann. § 18.2-32. An appropriate instruction defining the specific predicate offense must also be given.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

2 Charles E. Torcia, *Wharton's Criminal Law* § 150 (15th ed. 1993)

Instruction No. 33.220

Malice—Definition

Malice is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. Malice may result from any unlawful or unjustifiable motive including anger, hatred or revenge. You may, but are not required, to infer malice from any deliberate, willful, and cruel act against another, however sudden.

Heat of passion excludes malice when that heat of passion arises from provocation that reasonably produces an emotional state of mind such as hot blood, rage, anger, resentment, terror or fear so as to demonstrate an absence of deliberate design to kill, or to cause one to act on impulse without conscious reflection. Heat of passion must be determined from circumstances as they appeared to the defendant but those circumstances must be such as would have aroused heat of passion in a reasonable person.

If a person acts upon reflection or deliberation, or after his passion has cooled or there has been a reasonable time or opportunity for cooling, then the act is not attributable to heat of passion.

Note:

If there is no claim of heat of passion, the second and third paragraphs of the instruction should not be given. If there is no issue pertaining to cooling of heat of passion, the third paragraph of the instruction should not be given.

Sources & Authority

Governing Statute:

None.

Case Authority:

Witherow v. Commonwealth, 65 Va. App. 557, 566-67, 779 S.E.2d 223, 228 (2015); Huguely v. Commonwealth, 63 Va. App. 92, 128–29, 754 S.E.2d 557, 574–75 (2014); Couture v. Commonwealth, 51 Va. App. 239, 249, 656 S.E.2d 425, 430 (2008); Walshaw v. Commonwealth, 44 Va. App. 103, 110–22, 603 S.E.2d 633, 636–42 (2004); Rhodes v. Commonwealth. 41 Va. App. 195, 199–202, 583 S.E.2d 773, 775–76 (2003); Graham v. Commonwealth, 31 Va. App. 662, 671–72, 525 S.E.2d 567, 571 (2000); Craig v. Commonwealth, 34 Va. App. 155, 164–66, 538 S.E.2d 355, 359–60 (2000); aff'd per curiam, 257 Va. 239, 514 S.E.2d 147 (1999); Lynn v. Commonwealth, 27 Va. App. 336, 345–46, 499 S.E.2d 1, 5-6 (1998), Canipe v. Commonwealth, 25 Va. App. 629, 642, 491 S.E.2d 747, 753 (1997); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Rhodes v. Commonwealth, 238 Va. 480, 485–88, 384 S.E.2d 95, 98-99 (1989); Miller v. Commonwealth, 5 Va. App. 22, 24–25, 359 S.E.2d 841, 842–43 (1987); Essex v. Commonwealth, 228 Va. 273, 280–81, 322 S.E.2d 216, 219–20 (1984); Epperly v. Commonwealth, 224 Va. 214, 232, 294 S.E.2d 882, 892-93 (1982); Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981); Thomas v. Commonwealth, 186 Va. 131, 139, 41 S.E.2d 476, 480 (1947); Coleman v. Commonwealth, 184 Va. 197, 201, 35 S.E.2d 96, 97 (1945); Williamson v. Commonwealth, 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942); Davidson v. Commonwealth, 167 Va. 451, 455–58, 187 S.E. 437, 439–40 (1936); Ballard v. Commonwealth, 156 Va. 980, 993, 159 S.E. 222, 226 (1931).

Practice Commentary: Malice has been defined as any wrongful act done willfully or purposely. See *Williamson, 180 Va. at 280, 23 S.E.2d at 241.* However, the definition of malice is not narrowly interpreted; the jury has a wide range of discretion in determining whether or not it is present. *Thomas, 186 Va. at 139, 41 S.E.2d at 480*, states:

> Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief.

"Malice inheres in the doing of a wrongful act intentionally or without just cause or excuse, or as a result of ill will." *Wooden, 222 Va. at 762, 284 S.E.2d at 814.* Actual or "express malice appears when there is shown a deliberate intent to unlawfully take the life of another." *Coleman, 184 Va. at 201, 35 S.E.2d at 97.* Implied malice is malice that can be inferred from the circumstances of the killing.

Id.

Fear of harm can result in a reduction from murder to voluntary manslaughter even though it is insufficient for self-defense. *Couture, 51 Va. App. at 249, 656 S.E.2d at 430.*

☞ ***PRACTICE POINTER*:**

Whether an instruction respecting a "cooling off" period is required will depend on the facts. *Lynn, 27 Va. App. at 345–46, 499 S.E.2d at 5–6.*

☞ ***PRACTICE POINTER*:**

See also Instruction No. 37.200, Malice—Definition and the accompanying Practice Commentary.

! ***ALERTS*:**

• The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language, and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.230

Malice—Murder and Manslaughter Distinguished

The difference between murder and manslaughter is malice. When malice is present, the killing is murder. When it is absent, the killing can be no more than manslaughter.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Woods v. Commonwealth, 66 Va. App. 123, 132, 782 S.E.2d 613, 618 (2016); *Walshaw v. Commonwealth, 44 Va. App. 103, 110–22, 603 S.E.2d 633, 636–42 (2004); Craig v. Commonwealth, 34 Va. App. 155, 164–66, 538 S.E.2d 355, 359–60 (2000); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Jenkins v. Commonwealth, 244 Va. 445, 457–58, 423 S.E.2d 360, 368 (1992); Essex v. Commonwealth, 228 Va. 273, 280–81, 322 S.E.2d 216, 291–20 (1984); Epperly v. Commonwealth, 224 Va. 214, 232, 294 S.E.2d 882, 892–93 (1982); Hodge v. Commonwealth, 217 Va. 338, 341–47, 228 S.E.2d 692, 695–98 (1976); Belton v. Commonwealth, 200 Va. 5, 9, 104 S.E.2d 1, 4–5 (1958); Thomas v. Commonwealth, 186 Va. 131, 139, 41 S.E.2d 476, 480 (1947); Coleman v. Commonwealth, 184 Va. 197, 201, 35 S.E.2d 96, 97 (1945); Williamson v. Commonwealth, 180 Va. 277, 280, 23 S.E.2d 240, 241 (1942); Hannah v. Commonwealth, 153 Va. 863, 869, 149 S.E. 419, 421 (1929).*

PRACTICE COMMENTARY: The presence of malice is necessary before the defendant can be guilty of either first or second degree murder. Without malice, there can be no murder. See *Craig, 34 Va. App. at 164–66, 538 S.E.2d at 359–60; Hannah, 153 Va. at 869, 149 S.E. at 421.*

The element in murder, either in the first or second degree, which distinguishes it from voluntary manslaughter is malice, express or implied. See generally *Essex, 228 Va. 273, 322 S.E.2d 216; Williamson, 180 Va. 277, 23 S.E.2d 240.*

Malice must not be confused with passion, the essential element of voluntary manslaughter. As stated in *Belton*:

> Malice aforethought implies a mind under the sway of reason, whereas passion, while it does not imply dethronement of reason, yet is the *furor brevis* which renders a man deaf to the value of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. Passion and malice are therefore inconsistent motive powers, and hence an act which proceeds from the one cannot also proceed from the other.

200 Va. at 9, 104 S.E.2d at 4–5.

☞ ***PRACTICE POINTER:***

A defendant is entitled to an instruction on voluntary manslaughter when he produces some credible evidence that he acted in the heat of passion.

☞ ***PRACTICE POINTER:***

See also Instruction No. 37.200, Malice—Definition.

ALERTS:

- This instruction would not be applicable in felony murder cases.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.240

Malice—Inference From Use of Deadly Weapon

You may, but are not required, to infer malice from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt as to whether malice existed.

A deadly weapon is any object or instrument, not part of the human body, that is likely to cause death or great bodily injury because of the manner and under the circumstances in which it is used.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Williams v. Commonwealth, 64 Va. App. 240, 248–55, 767 S.E.2d 252, 256–60 (2015); *Tizon v. Commonwealth, 60 Va. App. 1, 10–12, 723 S.E.2d 260, 264–65 (2012)*; *Hampton v. Commonwealth, 34 Va. App. 412, 542 S.E.2d 41 (2001)*; *Satcher v. Commonwealth, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992)*; *Strickler v. Commonwealth, 241 Va. 482, 493–95, 404 S.E.2d 227, 234–35 (1991)*; *Smith v. Commonwealth, 239 Va. 243, 259–60, 389 S.E.2d 871, 879–80 (1990)*; *Perricllia v. Commonwealth, 229 Va. 85, 93–94, 326 S.E.2d 679, 684–85 (1985)*; *Quintana v. Commonwealth, 224 Va. 127, 146–49, 295 S.E.2d 643, 653–54 (1982)*; *Warlitner v. Commonwealth, 217 Va. 348, 349–52, 228 S.E.2d 698, 699–701 (1976)*; *Floyd v. Commonwealth, 191 Va. 674, 683–84, 62 S.E.2d 6, 10 (1950)*; *Murphy v. Commonwealth, 64 Va. (23 Gratt.) 960, 972 (1873)*.

PRACTICE COMMENTARY: The inference of malice from the use of a deadly weapon has long been recognized as a principle of the law of homicide in Virginia. See, e.g., *Murphy, 64 Va. (23 Gratt.) at 972*.

The court may declare that certain weapons, such as a dirk, an ax, or a loaded pistol, are "deadly weapons" as a matter of law. See, e.g., *Floyd, 191 Va. at 683–84, 62 S.E.2d at 10*. However, if the court does not resolve the issue as a matter of law, then the jury must decide if a particular weapon should be classified as "deadly." *Id.* Generally, a "deadly weapon" is one that is likely to produce death or great bodily injury. *Id.* Nevertheless, when deciding the question of "deadliness," the Court noted in *Quintana* that the manner in which the weapon is used is often more important than its inherent characteristics and capabilities. *224 Va. at 140, 295 S.E.2d at 649*.

A person is armed from the moment he seizes a weapon with intent to use it for a criminal purpose. *Id.*

PRACTICE POINTER:

The second paragraph of this instruction is identical to Instruction No. 18.850, which defines deadly weapon. Additional commentary follows that instruction.

ALERTS:

• The defendant may be entitled to a right-to-arm instruction. That instruction dispels the inference of malice permitted by this instruction. See Instruction No. 52.520, Right to Arm.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.260

Willful, Deliberate, and Premeditated

"Willful, deliberate, and premeditated" means a specific intent to kill, adopted at some time before the killing, but which need not exist for any particular length of time.

Sources & Authority

Governing Statute:

None.

Case Authority:

Kirby v. Commonwealth, 50 Va. App. 691, 700, 653 S.E.2d 600, 604 (2007); Lenz v. Commonwealth, 261 Va. 451, 469, 544 S.E.2d 299, 309 (2001); Schmitt v. Commonwealth, 262 Va. 127, 143, 547 S.E.2d 186, 197–98 (2001); Remington v. Commonwealth, 262 Va. 333, 352, 551 S.E.2d 620, 632 (2001); Haywood v. Commonwealth, 20 Va. App. 562, 565–68, 458 S.E.2d 606, 607–09 (1995); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Breard v. Commonwealth, 248 Va. 68, 83, 445 S.E.2d 670, 679 (1994); Stewart v. Commonwealth, 245 Va. 222, 241–42, 427 S.E.2d 394, 407 (1993); Rhodes v. Commonwealth, 238 Va. 480, 485–88, 384 S.E.2d 95, 98–99 (1989); Peterson v. Commonwealth, 225 Va. 289, 294–303, 302 S.E.2d 520, 524–28 (1983); Smith v. Commonwealth, 220 Va. 696, 700, 261 S.E.2d 550, 553 (1980); Giarratano v. Commonwealth, 220 Va. 1064, 1074, 266 S.E.2d 94, 100 (1980); Nobles v. Commonwealth, 218 Va. 548, 551, 238 S.E.2d 808, 810 (1977); Akers v. Commonwealth, 216 Va. 40, 48, 216 S.E.2d 28, 33 (1975); Bailey v. Commonwealth, 193 Va. 814, 71 S.E.2d 368 (1952); Pannill v. Commonwealth, 185 Va. 244, 255, 38 S.E.2d 457, 463 (1946).

Practice Commentary: For the category of murders in which willfulness, deliberation and premeditation are issues, the element of premeditation is usually the key to distinguishing between first and second degree murder. In order for a defendant to be guilty of that category of first degree murder the killing must be "wilful, deliberate and premeditated." See *Pannill, 185 Va. at 255, 38 S.E.2d at 462–63.* In *Pannill*, the court further defined the nature of a willful, deliberate, and premeditated killing:

> [I]t is necessary that the killing should have been done on purpose, and not by accident, or without design; that the accused must have reflected with a view to determine whether he would kill or not, and that he must have determined to kill as the result of that reflection, before he does the act—that is to say, the killing must be a predetermined killing upon consideration.

185 Va. at 255, 38 S.E.2d at 463.

The intent need not exist for a prescribed length of time prior to the actual killing. See *Akers, 216 Va. at 48, 216 S.E.2d at 33.* ("It is the will and purpose to kill, not necessarily the interval of time, which determine the grade of the offense.") See also *Smith, 220 Va. at 700–01, 261 S.E.2d at 553; Hairston v. Commonwealth, 217 Va. 429, 230 S.E.2d 626 (1976).* A matter of seconds was held sufficient time in *Shell v. Commonwealth, 11 Va. App. 247, 257, 397 S.E.2d 673, 678–79 (1990)* and in *Giarratano, 220 Va. at 1074, 266 S.E.2d at 100.*

Anger does not necessarily preclude a willful, deliberate, and premeditated killing. *Bailey, 193 Va. at 829–30, 71 S.E.2d at 376.* In *Bailey* the court reasoned:

"The person lying in wait to kill is probably angry at his victim. When he fires his shot his anger may be such that he was not at that moment deliberating. But if previous anger caused him to premeditate the killing, his act is still murder." *Id.*

☞ ***PRACTICE POINTER:***

"Intent . . . is the purpose formed in a person's mind, which may be shown by the circumstances surrounding the offense, including the person's conduct and his statements." *Nobles, 218 Va. at 551, 238 S.E.2d at 810.* See also *Haywood, 20 Va. App. 562, 458 S.E.2d 606.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.300

Inference of Second Degree Murder

Once the Commonwealth has proved there was an unlawful killing, then you may, but are not required, to infer that there was malice and that the act was murder in the second degree unless, from all the evidence, you have a reasonable doubt as to whether malice existed.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Tizon v. Commonwealth, 60 Va. App. 1, 10–12, 723 S.E.2d 260, 264–65 (2012); *Thomas v. Commonwealth, 279 Va. 131, 161, 688 S.E.2d 220, 237 (2010)*; *Hodge v. Commonwealth, 217 Va. 338, 341–47, 228 S.E.2d 692, 695–98 (1976)*; *Warlitner v. Commonwealth, 217 Va. 348, 349–52, 228 S.E.2d 698, 699–701 (1976)*; *Mullaney v. Wilbur, 421 U.S. 684, 702–03 (1975)*; *Adams v. Commonwealth, 201 Va. 321, 325, 111 S.E.2d 396, 399 (1959)*; *Hannah v. Commonwealth, 153 Va. 863, 871, 149 S.E. 419, 422 (1929)*.

PRACTICE COMMENTARY: Every unlawful homicide may be inferred by the trier of fact to be murder in the second degree; that is to say, to have been done with malice. *Hannah, 153 Va. at 869, 149 S.E. at 421*. But see *Essex v. Commonwealth, 228 Va. 273, 322 S.E.2d 216 (1984)*, where drunken driving results in death.

However, there is no inference that the killing was willful, deliberate, and premeditated. *Adams, 201 Va. at 325, 111 S.E.2d at 399*. The Commonwealth must prove the existence of a specific intent to kill in order to convict the defendant of first degree murder. *Id.*

The constitutionality of this inference (sometimes referred to in older cases as a "presumption") was attacked in *Hodge,* which held that the prosecution must prove beyond a reasonable doubt the absence of heat of passion in murder cases. However, the court held that the so-called presumption does not violate the principle of due process that was articulated in *Mullaney, 421 U.S. at 702–03,* because "[t]he Virginia presumption amounts to no more than an inference which the trier of fact is permitted, but is not required, to draw from proven facts." *Hodge, 217 Va. at 343, 228 S.E.2d at 696*. "[I]t is permissible to require the accused to produce 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt." *Id., at 342, 228 S.E.2d at 695.*

An instruction that every unlawful homicide "may be inferred" to be second degree murder was specifically approved by the court in *Warlitner. 217 Va. at 349–52, 228 S.E.2d at 699–701.*

ALERTS:

- See Instruction No. 52.530, Accident as to accidental killing.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide.

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.320

Second Degree Murder

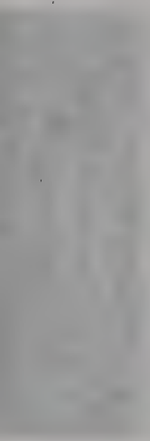
The defendant is charged with the crime of second degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed (name of person); **and**

(2) That the killing was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty of second degree murder.



Instruction No. P33.320

Second Degree Murder

You have found the defendant guilty of the crime of second degree murder.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-32.

CASE AUTHORITY:

Montano v. Commonwealth, 61 Va. App. 610, 616, 739 S.E.2d 241, 244 (2013); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Heacock v. Commonwealth, 228 Va. 397, 405–06, 323 S.E.2d 90, 95 (1984); Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981); Wright v. Commonwealth, 213 Va. 352, 353, 192 S.E.2d 748, 749 (1972); McDaniel v. Commonwealth, 77 Va. 281, 284–88 (1883).

PRACTICE COMMENTARY: Intent to kill is not essential to second degree murder, if intent to inflict great bodily harm exists. See generally *McDaniel, 77 Va. 281.*

The key element of this offense is malice, either express or implied. See the Practice Commentary to Instruction Nos. 33.220, Malice—Definition and 33.230, Malice—Murder and Manslaughter Distinguished for a full discussion of this point. See also *Heacock, 228 Va. 397, 323 S.E.2d 90; Wooden, 222 Va. 758, 284 S.E.2d 811.*

An instruction based on second degree murder should not be given unless it is warranted by the evidence. *Porter v. Commonwealth, 276 Va. 203, 240–43, 661 S.E.2d 415, 433–35 (2008)*; *Remington v. Commonwealth, 262 Va. 333, 351–52, 551 S.E.2d 620, 631–32 (2001); Bunch v. Commonwealth, 225 Va. 423, 440–41, 304 S.E.2d 271, 281 (1983).* Thus, if the evidence clearly indicates that the killing only meets the statutory definition of first degree murder, it is not error to instruct the jury solely on that type of homicide. In such a case, the defendant could only be guilty of first degree murder, or not guilty. See *Wright, 213 Va. at 353, 192 S.E.2d at 749.*

ALERTS:

• The legislature has established the killing of a fetus as a separate crime. Va. Code Ann. § 18.2-32.2. In the absence of premeditation, the unlawful, willful, deliberate and malicious killing of a fetus of another has the same range of punishment as second degree murder. *Id.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.340

Second Degree Felony Homicide

The defendant is charged with the crime of felony homicide. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed (name of person); **and**

(2) That the killing was accidental and contrary to the intention of the defendant;

(3) That the killing was caused by acts performed in the commission of (name of felony) as that crime is separately defined; and

(4) That the killing and (name of felony) **were parts of one continuous transaction and were closely related in time and place.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of felony homicide.

Instruction No. P33.340

Second Degree Felony Homicide

You have found the defendant guilty of the crime of felony homicide.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-33.

CASE AUTHORITY:

Edwards v. Commonwealth, 65 Va. App. 655, 665–67, 779 S.E.2d 858, 862–63 (2015); *Montano v. Commonwealth, 61 Va. App. 610, 616, 739 S.E.2d 241, 244 (2013)*; *Woodard v. Commonwealth, 61 Va. App. 567, 572–76, 739 S.E.2d 220, 222–24 (2013)*; *Hylton v. Commonwealth, 60 Va. App. 50, 57–58, 723 S.E.2d 628, 632 (2012)*; *Payne v. Commonwealth, 277 Va. 531, 541, 674 S.E.2d 835, 840 (2009)*; *Cotton v. Commonwealth, 35 Va. App. 511, 514–16, 546 S.E.2d 241, 243–44 (2001); Commonwealth v. Montague, 260 Va. 697, 702, 536 S.E.2d 910, 913 (2000); Griffin v. Commonwealth. 33 Va. App. 413, 420–27, 533 S.E.2d 653, 659–60 (2000); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Talbert v. Commonwealth, 17 Va. App. 239, 245–47, 436 S.E.2d 286, 289–90 (1993); King v. Commonwealth, 6 Va. App. 351, 354, 368 S.E.2d 704, 705–06 (1988); Heacock v. Commonwealth, 228 Va. 397, 405–06, 323 S.E.2d 90, 95 (1984); Wooden v. Commonwealth, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981); Haskell v. Commonwealth, 218 Va. 1033, 1044, 243 S.E.2d 477, 483 (1978).*

PRACTICE COMMENTARY: A separate instruction should be prepared that defines the felony that was being committed.

*Wooden, 222 Va. 758, 284 S.E.2d 811,*discusses first degree felony murder under Va. Code Ann. § 18.2-32.

In a felony murder case, "the malice inherent in the predicate felony is sufficient to prove the malice required for second degree murder." *Betancourt v. Commonwealth, 26 Va. App. 363, 374 n.1, 494 S.E.2d 873, 878 n.1 (1998)*; *accord*, *Wooden, 222 Va. at 762, 284 S.E.2d at 814.*

Haskell discusses the res gestae rule and whether felony murder can occur as late as during escape from the felony or during efforts to avoid detection. *218 Va. at 1041–44, 243 S.E.2d at 482–84.* "[T]he felony-murder statute applies where the initial felony and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal connection, as where the killing was done in flight from the scene of the crime to prevent detection or promote escape." *Id., at 1041, 243 S.E.2d at 482.* However, no malice can be imputed to a defendant for the death of a co-perpetrator when the killing of the co-perpetrator is done by a third party who is resisting, not furthering the felony. *King, 6 Va. App. at 357, 368 S.E.2d at 707.*

In *Montano*, a conviction of felony homicide was affirmed where death resulted from the improper operation of an automobile by an intoxicated driver who was committing a felony third offense driving while intoxicated. *61 Va. App. at 615–17, 739 S.E.2d at 243–44.*

In *Heacock*, the court held that where a defendant feloniously distributes cocaine

and the recipient dies of an overdose, the defendant may be found guilty of murder in the second degree. *228 Va. at 405–06, 323 S.E.2d at 95*. See also *Hylton, 60 Va. App. at 57–58, 723 S.E.2d at 632; Hickman v. Commonwealth, 11 Va. App. 369, 398 S.E.2d 698 (1990)*. In *Talbert*, the refusal to give an accurate *res gestae* instruction similar to Instruction No. 33.340 was error, and the conviction was reversed. *17 Va. App. at 246, 436 S.E.2d at 290*.

However, in *Woodard*, the Court of Appeals ruled that a felony drug distribution that was not sufficiently connected in time and place to a death did not support a conviction for felony homicide. *61 Va. App. at 572–76, 739 S.E.2d at 222–24*. In that case, the defendant sold ecstasy to a purchaser at a shopping center parking lot. *Id.* Two hours later, the buyer ingested the fatal dose of the drug in her apartment. *Id.*

In *Davis v. Commonwealth, 12 Va. App. 408, 404 S.E.2d 377 (1991)*, a conviction of felony homicide based on death resulting from the reckless operation of a motor vehicle by a felony habitual offender attempting to avoid apprehension was affirmed.

In *Cotton*, felony murder was committed when the defendant violated Va. Code Ann. § 18.2-371.1 (child abuse). *35 Va. App. 511, 546 S.E.2d 241*.

☞ ***PRACTICE POINTER:***

There must be a causal relationship between the underlying felony and the death of the victim. In *Montague*, the Supreme Court held that time, place, and causal connection must all be established. *260 Va. at 702, 536 S.E.2d at 913*. See also *Woodard, 61 Va. App. at 572, 739 S.E.2d at 222*; *Montano, 61 Va. App. at 616 n.3, 739 S.E.2d at 244 n.3*.

☞ ***PRACTICE POINTER:***

Convictions and punishments for both felony homicide (Va. Code Ann. § 18.2-33) and aggravated involuntary manslaughter (Va. Code Ann. § 18.2-36.1) stemming from the death of the same victim do not violate the double jeopardy clause of the Fifth Amendment to the United States Constitution, because each statute requires proof of a fact which the other does not. *Payne, 277 Va. at 541, 674 S.E.2d at 840* (citing *Blockburger v. U.S., 284 U.S. 299, 304 (1932)*).

! *ALERTS:*

• Va. Code Ann. § 18.2-33, upon which this instruction is based, defines felony homicide as "the killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than specified in §§ 18.2-31 and 18.2-32." The statute declares the crime to be murder of the second degree and punishable as such. Va. Code Ann. § 18.2-33. At least two commentators, however, have opined that the Model Instruction is wrong to require the Commonwealth to prove beyond a reasonable doubt that the killing was accidental and that the defendant did not intend to kill. Roger D. Groot, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, 269 (1988); Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide," 348 (2018).

In a case where this precise issue was not before it, the Virginia Court of Appeals, in dicta, cited with approval Professor Groot's view that, although the accident/lack of intent language had been part of the definition of involuntary manslaughter for at least 50 years, it had never been treated as identifying elements of the offense. *Cotton, 35 Va. App. at 515, n.3, 546 S.E.2d at 244.* Neither the Court of Appeals nor the Supreme Court of Virginia has addressed the issue directly. Until the issue is resolved by the courts, the Model Jury Instruction Committee has retained that element in the Model Instruction.

• An attempt to commit a felony is considered a felony for purposes of second degree felony homicide. Va. Code Ann. § 18.2-33. Simple assault may be a lesser included offense of attempted murder. *Edwards, 65 Va. App. at 665–67, 779 S.E.2d at 862–63*; *Martin v. Commonwealth, 13 Va. App. 524, 414 S.E.2d 401 (1992).* An instruction on assault may be required in appropriate cases. *Edwards, 65 Va. App. at 665–67, 779 S.E.2d at 862–63*; *Martin, 13 Va. App. at 526–27, 414 S.E.2d at 402.* But see Instruction 33.900, Transferred Intent—General, if the predicate felony is attempted murder.

• The act or acts causing death must have been directly calculated to further the felony or necessitated by the commission of the felony. *King, 6 Va. App. at 358–59, 368 S.E.2d at 708–09.* In cases where this is an issue, the instruction will need to be modified accordingly.

• When the felony committed is arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, the appropriate statute is Va. Code Ann. § 18.2-32 and Instruction No. 33.200(b), First Degree Felony Murder should be used instead of this instruction.

• By definition, a second degree felony homicide is accidental and contrary to the intention of the parties. In *King, 6 Va. App. 351, 368 S.E.2d 704*, the Court of Appeals held that under the felony-murder doctrine, malice is imputed upon the theory that the increased risk of death or serious harm demonstrated the felon's lack of concern for human life.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.345

"In the Commission of"—Definition for Second Degree Felony Homicide

To be in the commission of (name of felony) **requires that the killing result** [from an act that was an integral part of the (name of felony); an act in direct furtherance of the (name of felony); an act necessitated by the (name of felony)].

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-33.

CASE AUTHORITY:

Woodard v. Commonwealth, 61 Va. App. 567, 572–76, 739 S.E.2d 220, 222–24 (2013); *Payne v. Commonwealth, 277 Va. 531, 541, 674 S.E.2d 835, 840 (2009)*; *Griffin v. Commonwealth, 33 Va. App. 413, 420–27, 533 S.E.2d 653, 659–60 (2000)*; *King v. Commonwealth, 6 Va. App. 351, 354, 368 S.E.2d 704, 705–06 (1988).*

PRACTICE COMMENTARY: In *Woodard*, the Court of Appeals of Virginia held that a death following the felony distribution of drugs was not sufficiently connected in time and place to the predicate offense so as to fall within the *res gestae* requirement [element (4) of Instruction 33.340]. *61 Va. App. 567, 739 S.E.2d 220.* The defendant sold ecstasy (MDMA), a Schedule I narcotic. *Id.* The victim ingested the drug two hours after the defendant sold it to her. *Id.* Furthermore, the victim purchased the drug from Woodard in a shopping center parking lot, but ingested the fatal dose in her apartment. *Id.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.400

Motive

To prove the charge of murder the Commonwealth does not have to prove a motive for the killing. The presence or absence of a motive may be considered in arriving at your verdict.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Brown v. Commonwealth, 238 Va. 213, 220–21, 381 S.E.2d 225, 230 (1989); Cantrell v. Commonwealth, 229 Va. 387, 396–98, 329 S.E.2d 22, 28–29 (1985); Robinson v. Commonwealth, 228 Va. 554, 557–58, 322 S.E.2d 841, 843 (1984); Smith v. Commonwealth, 220 Va. 696, 702–03, 261 S.E.2d 550, 554 (1980); Ward v. Commonwealth, 205 Va. 564, 570, 138 S.E.2d 293, 297 (1964); Mullins v. Commonwealth, 113 Va. 787, 789–90, 75 S.E. 193, 195 (1912); Burton v. Commonwealth, 108 Va. 892, 896, 62 S.E. 376, 378 (1908).

PRACTICE COMMENTARY: Motive is not an essential element of first or second degree murder; however, motive often relates to the intent of the defendant, especially when the conviction is based primarily on circumstantial evidence. *Ward, 205 Va. at 570, 138 S.E.2d at 297.* See also *Cantrell, 229 Va. at 396–98, 329 S.E.2d at 28–29; Robinson, 228 Va. at 557–58, 322 S.E.2d at 843; Smith, 220 Va. at 702–03, 261 S.E.2d at 554.*

As indicated in *Burton*, motive may be inferred from the circumstances of the case, but the mere proof of a motive is not sufficient to convict the defendant of homicide. *108 Va. at 896, 62 S.E. at 378.*

PRACTICE POINTER:

The Court indicated in *Mullins* that before a fact or circumstance is permitted as evidence of a motive, it must be shown that the fact or circumstance was known to the defendant. *113 Va. at 789–90, 75 S.E. at 195.* See also *Hodges v. Commonwealth, 272 Va. 418, 437–38, 634 S.E.2d 680, 690 (2006); Smallwood v. Commonwealth, 36 Va. App. 483, 494, 553 S.E.2d 140, 145 (2001).* The rationale for this principle is that a "man cannot be influenced or moved to act by a fact or circumstance of which he is ignorant." *Mullins, 113 Va. at 790, 75 S.E. at 195.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.500

Voluntary Manslaughter

The defendant is charged with the crime of voluntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant killed** (name of person); **and**

(2) **That the killing was the result of an intentional act; and**

(3) **That the killing was committed while** [in the sudden heat of passion upon reasonable provocation; in mutual combat].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 31,500

Voluntary Manslaughter

Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed [name or person]; and

(2) [Identify other element or elements]; and

(3) [Identify other element or elements]; and

[Insert any additional elements].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. But if you do not so find, you shall find the defendant not guilty.

Instruction No. P33.500

Voluntary Manslaughter

You have found the defendant guilty of the crime of voluntary manslaughter.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-35.

Case Authority:

Woods v. Commonwealth, 66 Va. App. 123, 132, 782 S.E.2d 613, 618 (2016); *Avent v. Commonwealth, 279 Va. 175, 197–98, 688 S.E.2d 244, 256–57 (2010)*; *Couture v. Commonwealth, 51 Va. App. 239, 249, 656 S.E.2d 425, 430 (2008)*; *Connell v. Commonwealth, 34 Va. App. 429, 439–40, 542 S.E.2d 49, 54 (2001)*; *Caudill v. Commonwealth, 27 Va. App. 81, 84–85, 497 S.E.2d 513, 514–15 (1998)*; *Turner v. Commonwealth, 23 Va. App. 270, 274, 476 S.E.2d 504, 506 (1996)*; *Stewart v. Commonwealth, 245 Va. 222, 229, 427 S.E.2d 394, 399 (1993)*; *Jenkins v. Commonwealth, 244 Va. 445, 457–58, 423 S.E.2d 360, 368 (1992)*; *Potter v. Commonwealth, 222 Va. 606, 610–11, 283 S.E.2d 448, 450–51 (1981)*; *McClung v. Commonwealth, 215 Va. 654, 656, 212 S.E.2d 290, 292 (1975)*; *Belton v. Commonwealth, 200 Va. 5, 9, 104 S.E.2d 1, 4–5 (1958)*; *Harper v. Commonwealth, 165 Va. 816, 820, 183 S.E. 171, 173 (1936)*; *Ballard v. Commonwealth, 156 Va. 980, 993, 159 S.E. 222, 226 (1931)*; *Jacobs v. Commonwealth, 132 Va. 681, 689, 111 S.E. 90, 93 (1922)*; *Harris v. Commonwealth, 134 Va. 688, 694, 114 S.E. 597, 599-600 (1922)*; *Watson v. Commonwealth, 87 Va. 608, 616–17, 13 S.E. 22, 25–26 (1891)*; *Read v. Commonwealth, 63 Va. (22 Gratt.) 924, 938–39 (1872)*.

Practice Commentary: The key distinction between murder and voluntary manslaughter is heat of passion. "Passion and malice are therefore inconsistent motive powers, and hence an act which proceeds from the one cannot also proceed from the other . . . . Malice excludes passion. Passion presupposes the absence of malice. In law they cannot coexist." *Belton, 200 Va. at 9–10, 104 S.E.2d at 5*.

The heat of passion, however, must arise from a reasonable provocation. See generally *Avent, 279 Va. at 201–02, 688 S.E.2d at 258–59*; *Harris, 134 Va. at 694, 114 S.E. at 599–600*. Whether or not a provocation is reasonable depends on the nature and degree of provocation and the manner in which it is resented. *Ballard, 156 Va. at 993, 159 S.E.at 226*. In *Ballard,* the Court made it clear that a slight provocation will never reduce the killing from murder to voluntary manslaughter. *Id*. Fear of harm and rage can constitute heat of passion sufficient to reduce murder to voluntary manslaughter. *Dandridge v. Commonwealth, 72 Va. App. 669, 681–82, 852 S.E.2d 488, 494 (2021)*; *Couture, 51 Va. App. at 249, 656 S.E.2d at 430*.

Even if the circumstances of the case would constitute a reasonable provocation, the defendant must in fact be provoked to kill in a heat of passion: "If a person, on receiving the gravest provocation, is unmoved by passion, but wantonly and willfully and wickedly kills his adversary otherwise than in self-defense, he is guilty of murder . . . . Provocation without passion, or passion without provocation will not do; both must occur to reduce the offense to the grade of manslaughter." *Jacobs, 132 Va. at 689, 111 S.E. at 93*. If a defendant who was

reasonably provoked into a heat of passion has had time to cool down before the killing, the offense cannot be reduced to manslaughter. *Watson, 87 Va. at 616–17, 13 S.E.2d at 25–26.* Thus the defendant's mind must be in a state of heated passion at the time of the killing. *Id.* In *Potter,* the court held that the uncontradicted evidence showed an uninterrupted struggle initiated by a knife attack by the victim. *222 Va. 606, 283 S.E.2d 448.* Thus, an instruction permitting a finding of murder "if there has been a sufficient time for passion to subside and for reason to return," was not supported by the evidence. *Id. at 610–11, 283 S.E.2d at 450–51.*

While most voluntary manslaughter cases involve heat of passion upon reasonable provocation, this instruction also applies to cases of mutual combat. For that combat "[t]o be mutual, it must have been voluntarily and mutually entered to." *Harper, 165 Va. at 820, 183 S.E. at 173.*

Voluntary Manslaughter as Lesser Included Offense. As a general rule, a trial court must instruct the jury on the lesser included offense of voluntary manslaughter if the evidence of heat of passion and reasonable provocation amounts to "more than a scintilla." *Dandridge, 72 Va. App. at 682, 852 S.E.2d at 494*; *Woods, 66 Va. App. at 132, 782 S.E.2d at 618; Turner, 23 Va. App. at 274, 476 S.E.2d at 506, aff'd, 255 Va. 1, 492 S.E.2d 447 (1997).* Where the undisputed evidence is inconsistent with the defendant's version of the facts, however, the defendant's evidence does not amount to more than a scintilla and a lesser included offense instruction should not be given. *Id. (citing Commonwealth v. Leal, 265 Va. 142, 574 S.E.2d 285 (2003)); Commonwealth v. Vaughn, 263 Va. 31, 557 S.E.2d 220 (2002); McClung, 215 Va. 654, 212 S.E.2d 290).*

Where there is credible evidence of provocation and heat of passion, however, the defendant is entitled to a jury instruction on voluntary manslaughter. *Dandridge, 72 Va. App. at 682, 852 S.E.2d at 494*; *Turner, 23 Va. App at 275, 276 S.E.2d at 507; McClung, 215 Va. at 656, 212 S.E.2d at 292.*

☞ ***PRACTICE POINTER:***

Voluntary manslaughter is a common law crime in Virginia: Va. Code Ann. § 18.2-35 only provides for punishment upon conviction.

ALERTS:

• A homicide committed in pursuance of a preconceived plan is not voluntary manslaughter, even if the actual killing resulted from a reasonable provocation. *Read, 63 Va. at 938–39.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.550

Words as Provocation

Words alone, no matter how offensive or insulting they may be, are never sufficient provocation to reduce the offense of murder to manslaughter.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Rhodes v. Commonwealth, 41 Va. App. 195, 199–202, 583 S.E.2d 773, 775–76 (2003); Caudill v. Commonwealth, 27 Va. App. 81, 84–85, 497 S.E.2d 513, 514–15 (1998); Royal v. Commonwealth, 2 Va. App. 59, 66, 341 S.E.2d 660, 664 (1986), rev'd on other grounds, 234 Va. 403, 362 S.E.2d 323 (1987); McCoy v. Commonwealth, 133 Va. 731, 739–40, 112 S.E. 704, 707 (1922); Reynolds v. Commonwealth, 133 Va. 760, 769–71, 112 S.E. 707, 710–11 (1922); Read v. Commonwealth, 63 Va. (22 Gratt.) 924, 938 (1872).

PRACTICE COMMENTARY: The principle that words alone are not sufficient provocation to justify killing in the heat of passion evolved from cases in which murders were committed with deadly weapons. See *McCoy, 133 Va. at 739–40, 112 S.E. at 707*; *Reynolds, 133 Va. at 769–71, 112 S.E. 710–11.*

The rationale which supported the development of this principle, as articulated by the Court in *Read*, was based on two considerations: the extreme value that is placed on human life, and the strong policy against the use of deadly weapons by one who has only been verbally insulted or provoked. *63 Va. at 938.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.600

Involuntary Manslaughter—General

The defendant is charged with the crime of involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed (name of person); **and**

(2) That the killing, although unintended, was the direct result of [negligence; the unlawful performance of a lawful act, accompanied by carelessness; the performance of an unlawful, but not felonious, act, accompanied by carelessness] **so gross, wanton and culpable as to show a callous disregard of human life.**

[(1) That the defendant owed (name of person) a legal duty; and

(2) That the death of (name of person) was the direct result of the defendant's failure to perform the legal duty owed to (name of person); and

(3) That the defendant's failure to perform the duty constituted negligence so gross, wanton and culpable as to show a callous disregard for human life.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P33.600

Involuntary Manslaughter—General

You have found the defendant guilty of the crime of involuntary manslaughter.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Note:

The instruction includes two different sets of elements. Only the set fitting the facts of the case should be used.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-36.

CASE AUTHORITY:

Commonwealth v. Gregg, 295 Va. 293, 811 S.E.2d 254 (2018); *Cheung v. Commonwealth, 63 Va. App. 1, 13-14, 753 S.E.2d 854, 859–60 (2014)*; *Noakes v. Commonwealth, 280 Va. 338, 348–49, 699 S.E.2d 284, 290 (2010)*; *Brown v. Commonwealth, 278 Va. 523, 529, 685 S.E.2d 43, 46 (2009)*; *Coyle v. Commonwealth, 50 Va. App. 656, 662–64, 653 S.E.2d 291, 294 (2007); West v. Director, 273 Va. 56, 63–64, 639 S.E.2d 190, 196 (2007); Banks v. Commonwealth, 41 Va. App. 539, 546–49, 586 S.E.2d 876, 879–80 (2003); Waters v. Commonwealth, 39 Va. App. 72, 78–80, 569 S.E.2d 763, 766–67 (2002); Lawson v. Commonwealth, 35 Va. App. 610, 618–20, 547 S.E.2d 513, 516-18 (2001); Craig v. Commonwealth, 34 Va. App. 155, 164–66, 538 S.E.2d 355, 359–60 (2000); Conrad v. Commonwealth, 31 Va. App. 113, 120-24, 521 S.E.2d 321, 325–27 (1999)*; *Castillo v. Commonwealth, 21 Va. App. 482, 494–95, 465 S.E.2d 146, 152–53 (1995); Hubbard v. Commonwealth, 243 Va. 1, 14–16. 413 S.E.2d 875, 882–83 (1992); Cable v. Commonwealth, 243 Va. 236, 238–40, 415 S.E.2d 218, 220 (1992); Gallimore v. Commonwealth, 15 Va. App. 288, 289–90, 422 S.E.2d 613, 614 (1992); Darnell v. Commonwealth, 6 Va. App. 485, 489, 370 S.E.2d 717, 719 (1988); Bailey v. Commonwealth, 5 Va. App. 331, 333, 362 S.E.2d 750, 751 (1987); Davis v. Commonwealth, 230 Va. 201, 205, 335 S.E.2d 375, 378 (1985); King v. Commonwealth, 217 Va. 601, 606-07, 231 S.E.2d 312, 316 (1977); Beck v. Commonwealth, 216 Va. 1, 4, 216 S.E.2d 8, 9-10 (1975); Delawder v. Commonwealth, 214 Va. 55, 58, 196 S.E.2d 913, 915 (1973); Lewis v. Commonwealth, 211 Va. 684, 686, 179 S.E.2d 506, 508 (1971); Bell v. Commonwealth, 167 Va. 526, 540–41, 189 S.E. 441, 448 (1937); Goodman v. Commonwealth, 153 Va. 943, 951, 151 S.E. 168, 170 (1930).*

PRACTICE COMMENTARY: Involuntary manslaughter may arise from any of the following circumstances:

(1) the performance of an unlawful, but not felonious, act, *Lewis, 211 Va. at 686, 179 S.E.2d at 508*; or

(2) the improper performance of a lawful act, *Bailey, 5 Va. App. at 333, 362 S.E.2d at 750*; or

(3) the omission to perform a legal duty owed to the decedent, *Davis, 230 Va. at 205, 335 S.E.2d at 378.*

When involuntary manslaughter is based on the performance of an unlawful act, such as the violation of a statute, the court held in *Goodman* that the violation must be the proximate cause of the homicide. *153 Va. at 951, 151 S.E. at 170.*

In all cases, the defendant's negligence must be gross enough to indicate a callous disregard for life. See *Darnell, 6 Va. App. at 489, 370 S.E.2d at 719* (performance of an unlawful, but not felonious act); *Beck, 216 Va. at 4, 216 S.E.2d*

at 9–10 (improper performance of a lawful act); *Davis, 230 Va. at 205, 335 S.E.2d at 378* (omission to perform a legal duty). See also Instruction No. 33.610 defining criminal negligence. Falling asleep at the wheel was held not sufficient to support the offense in *Hargrove v. Commonwealth, 10 Va. App. 618, 394 S.E.2d 729 (1990).* But see *Cheung, 63 Va. App. at 13–14, 753 S.E.2d at 859–60* (driving a "substantial distance and time while in a tired and sleepy condition" were distinguishing from the facts in *Hargrove*); *Conrad, 31 Va. App. 113, 521 S.E.2d 321*; *Kennedy v. Commonwealth, 1 Va. App. 469, 339 S.E.2d 905 (1986).*

Whether a defendant knows of the dangerous risk he causes is measured by an objective awareness test, i.e., whether the defendant knew or should have known of the risk his conduct created. See generally *Noakes, 280 Va. 338, 699 S.E.2d 284*; *Gallimore, 15 Va. App. 288, 422 S.E.2d 613*. On the issues of the number of people at risk and the size of the vehicle, among other factors, in a vehicular accident case, see *Cheung, 63 Va. App. at 13–14, 753 S.E.2d at 859–60.*

When the defendant "put[s] into operation" intervening actions that cause death, he is criminally responsible for that death. *Noakes, 280 Va. at 348–49, 699 S.E.2d at 290* (affirming conviction for involuntary manslaughter when a childcare provider killed a 15-month-old child by leaving a dog crate on top of the child's crib that crushed the child); *Brown, 278 Va. 523, 685 S.E.2d 43* (discussing proximate cause in sustaining conviction for involuntary manslaughter when a police officer killed a motorist during a high-speed chase initiated by the defendant).

Generally, a statutory violation proximately causing death does not constitute involuntary manslaughter if the violation involves only simple negligence. See, e.g., *King, 217 Va. at 606–07, 231 S.E.2d at 316* (violation of safety statute); *Darnell, 6 Va. App. at 491–93, 370 S.E.2d at 720–21* (reckless handling of firearm). In most cases there must be a showing of criminal negligence, regardless of whether the charge is based on the violation of a statute or on the improper performance of a legal act. For example, the Supreme Court defined "involuntary manslaughter in the operation of a motor vehicle as the accidental killing which, although unintended, is the proximate result of negligence so gross, wanton, and culpable as to show a reckless disregard of human life," *King, 217 Va. at 607, 231 S.E.2d at 316*. See also *Keech v. Commonwealth, 9 Va. App. 272, 386 S.E.2d 813 (1989).* However, where the death is proximately caused by driving under the influence of alcohol, drugs, or a combination thereof, a showing of criminal negligence is not necessary to establish involuntary manslaughter under Va. Code Ann. § 18.2-36.1(A). In such cases, proof of criminal negligence elevates the offense to aggravated involuntary manslaughter. Va. Code Ann. § 18.2-36.1(B). See Instruction Nos. P33.650, Involuntary Manslaughter, Motor Vehicle—Under the Influence and P33.660, Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence.

The improper performance of a lawful act must amount to the unlawful commission of a lawful act, and the negligence must be criminal negligence.

Coyle, 50 Va. App. at 662–64, 653 S.E.2d at 294–95. Providing dangerous quantities of a lawful drug to another who voluntarily ingests it and dies can constitute criminal negligence. *Id.*

Although reckless driving is often a factor when the defendant is charged with involuntary manslaughter, the court held in *Delawder* that they are each separate and distinct offenses. *214 Va. at 58, 196 S.E.2d at 915.* Thus reckless driving is not a lesser included offense within the crime of involuntary manslaughter. *Id.* Driving under the influence of alcohol is not a lesser included offense. *Ange v. Commonwealth, 217 Va. 861, 234 S.E.2d 64 (1977).* However, involuntary manslaughter is a lesser included offense of aggravated involuntary manslaughter. *West, 273 Va. at 63–64, 639 S.E.2d at 196.*

Contributory negligence by the victim is no defense unless it is an independent and intervening act that alone caused the fatal accident. *Doggett v. Commonwealth, 66 Va. App. 219, 783 S.E.2d 555 (2016)*; *O'Connell v. Commonwealth, 48 Va. App. 719, 728–29, 634 S.E.2d 379, 383–84 (2006).* When the victim's negligence is foreseeable, such as in a drag race, it affords the defendant no defense. *Doggett, 66 Va. App. at 228–29, 783 S.E.2d at 219*; *O'Connell, 48 Va. App. at 729–32, 634 S.E.2d at 384–85.*

***ALERTS*:**

• For an instruction on aggravated involuntary manslaughter, see Instruction No. P33.660.

• Under the court's decision in *Craig, 34 Va. App. 155, 538 S.E.2d 355*, involuntary manslaughter can be a lesser included offense of second degree murder.

• The Double Jeopardy Clause bars multiple punishments for both involuntary manslaughter under Va. Code Ann. § 18.2-154 (shooting at an occupied vehicle where death results) and common law involuntary manslaughter based upon the same acts and the same victim. *Commonwealth v. Gregg, 295 Va. 293, 301, 811 S.E.2d 254, 258–59 (2018).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.610

Involuntary Manslaughter—Criminal Negligence—Definition

The gist of involuntary manslaughter is criminal negligence. It must be shown that the negligence of the defendant was gross or culpable negligence. Gross or culpable negligence is that which indicates a callous disregard of human life and of the probable consequences of his act. Criminal liability cannot be predicated upon every act carelessly performed merely because such carelessness results in the death of another. In order for criminal liability to result from negligence, it must necessarily be reckless or wanton and of such a character as to show disregard of the safety of others under circumstances likely to cause injury or death. Unless you believe from the evidence beyond a reasonable doubt that the defendant was guilty of negligence so culpable or gross as to indicate a callous disregard of human life and of the probable consequences of his act, you cannot find him guilty of involuntary manslaughter.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Miller v. Commonwealth, 64 Va. App. 527, 543–44, 769 S.E.2d 706, 714 (2015); *Cheung v. Commonwealth, 63 Va. App. 1, 13–14, 753 S.E.2d 854,859–60 (2014)*; *Noakes v. Commonwealth, 280 Va. 338, 346–48, 699 S.E.2d 284, 288–90 (2010)*; *Coyle v. Commonwealth, 50 Va. App. 656, 662–64, 653 S.E.2d 291, 294–95 (2007)*; *Craig v. Commonwealth, 34 Va. App. 155, 164–66, 538 S.E.2d 355, 359-60 (2000)*; *Conrad v. Commonwealth, 31 Va. App. 113, 120–24, 521 S.E.2d 321, 325–27 (1999)*; *Castillo v. Commonwealth, 21 Va. App. 482, 494–95, 465 S.E.2d 146, 152–53 (1995)*; *Gallimore v. Commonwealth, 15 Va. App. 288, 289–90, 422 S.E.2d 613, 614 (1992)*; *Darnell v. Commonwealth, 6 Va. App. 485, 489, 370 S.E.2d 717,719 (1988)*.

PRACTICE COMMENTARY: As determined by the Court of Appeals in *Darnell*, criminal negligence must be defined when it is an element of involuntary manslaughter. *6 Va. App. at 491–93, 370 S.E.2d at 720–21*.

Providing dangerous quantities of a lawful drug to another who voluntarily ingests it and dies can be criminal negligence. *Coyle, 50 Va. App. at 662–64, 653 S.E.2d at 294–95*.

In determining whether a particular course of conduct is criminally negligent "[i]t is not only the nature of the act or omission that matters. The vulnerability of the victim plays an equally important role in the culpability calculus." *Whitfield v. Commonwealth, 57 Va. App. 396, 405, 702 S.E.2d 590, 594 (2010)* (discussing the standard of care as it applies to children versus adults).

PRACTICE POINTER:

This instruction should be used with Instruction No. P33.600, Involuntary Manslaughter—General.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.650

Involuntary Manslaughter, Motor Vehicle—Under the Influence

The defendant is charged with the crime of involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [driving; operating] **a motor vehicle; and**

(2) **That at the time he was** [under the influence of alcohol; under the influence of a narcotic drug or a self-administered intoxicant or drug of whatsoever nature; under the influence of a combination of drugs; under the combined influence of alcohol and a drug or drugs] **to a degree which impaired his ability to** [drive; operate] **a motor vehicle safely; and**

(3) **That as a result of driving under the influence the defendant unintentionally caused the death of** (name of person).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P33.650

Involuntary Manslaughter, Motor Vehicle—Under the Influence

You have found the defendant guilty of the crime of involuntary manslaughter.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-36.1(A), 18.2-266.

CASE AUTHORITY:

West v. Director, 273 Va. 56, 63–64, 639 S.E.2d 190, 196 (2007); Conrad v. Commonwealth, 31 Va. App. 113, 120–24, 521 S.E.2d 321, 325–27 (1999); Stover v. Commonwealth, 31 Va. App. 225, 230–33, 522 S.E.2d 397, 400–01 (1999); Pollard v. Commonwealth, 20 Va. App. 94, 98–100, 455 S.E.2d 283,285–86 (1995); Castillo v. Commonwealth, 21 Va. App. 482, 494–95, 465 S.E.2d 146, 152–53 (1995).

PRACTICE COMMENTARY: These instructions must be used in conjunction with the driving while under the influence instructions contained in Chapter 21.

Under Va. Code Ann. § 18.2-36.2, this instruction may be modified for a charge of involuntary manslaughter as a result of operating a watercraft while under the influence.

PRACTICE POINTER:

For an instruction on aggravated involuntary manslaughter, see Instruction No. P33.660, Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence.

ALERTS:

• Double jeopardy does not preclude simultaneous convictions for driving under the influence and DUI involuntary manslaughter. *Dalo v. Commonwealth, 37 Va. App. 156, 554 S.E.2d 705 (2001).* However, involuntary manslaughter is a lesser included offense of aggravated involuntary manslaughter. *West, 273 Va. at 63–64, 639 S.E.2d at 195.*

• "Self-administered intoxicant or drug" includes drugs administered in a voluntary drug treatment program where the defendant agrees to ingest the substance by his participation in the program. *Lambert v. Commonwealth, 70 Va. App. 54, 64, 824 S.E.2d 18, 23 (2019).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12, 21.1.–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 118; and Homicide §§ 1–48

Instruction No. 33.660

Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence

The defendant is charged with the crime of aggravated involuntary manslaughter. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [driving; operating] **a motor vehicle; and**

(2) **That at the time he was** [under the influence of alcohol; under the influence of a narcotic drug or a self-administered intoxicant or drug of whatsoever nature; under the influence of a combination of drugs; under the combined influence of alcohol and a drug or drugs] **to a degree which impaired his ability to** [drive; operate] **a motor vehicle safely; and**

(3) **That as a result of driving under the influence the defendant unintentionally caused the death of** (name of person); **and**

(4) **That the defendant's conduct was so gross, wanton and culpable as to show a reckless disregard for human life.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of aggravated involuntary manslaughter [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of aggravated involuntary manslaughter.

Instruction No. P33.660

Aggravated Involuntary Manslaughter, Motor Vehicle—Under the Influence

You have found the defendant guilty of the crime of aggravated involuntary manslaughter.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years.

Sources & Authority

Governing Statute:

Va. Code Ann. §§ 18.2-36.1(B), 18.2-266.

Case Authority:

Davis v. Commonwealth, 57 Va. App. 446, 455–58, 703 S.E.2d 259, 263–65 (2011); *Wyatt v. Commonwealth, 47 Va. App. 411, 416–23, 624 S.E.2d 118, 121–23 (2006); Stevens v. Commonwealth, 46 Va. App. 234, 243, 616 S.E.2d 754, 758 (2005); West v. Director, 273 Va. 56, 63–64, 639 S.E.2d 190, 196 (2007); Cottee v. Commonwealth, 31 Va. App. 398, 400–02, 524 S.E.2d 132, 132–34 (2000); Hall v. Commonwealth, 32 Va. App. 616, 633–37, 529 S.E.2d 829, 838–39 (2000).*

Practice Commentary: These instructions must be used in conjunction with the driving while under the influence instructions contained in Chapter 21.

For an instruction on involuntary manslaughter, see Instruction No. 33.650, Involuntary Manslaughter, Motor Vehicle—Under the Influence. For an example on how to draft an instruction with involuntary manslaughter as a lesser included offense of aggravated involuntary manslaughter, see Instruction No. 33.700, Lesser Included Offenses (incorporating elements and punishments for first degree murder, second degree murder, and voluntary manslaughter).

Under Va. Code Ann. § 18.2-36.2, this instruction may be modified for a charge of aggravated involuntary manslaughter as a result of operating a watercraft while under the influence.

☞ ***Practice Pointer:***

Under *Hall*, proof of a violation of Va. Code Ann. § 18.2-266 is necessary for proof of a violation of Va. Code Ann. § 18.2-36.1. *Hall, 32 Va. App. at 626–27, 529 S.E.2d at 834–35*. But see *Stevens, 46 Va. App. at 243 n.3, 616 S.E.2d at 758 n.3* (limiting the holding in *Hall* to cases where inadmissible evidence is used to prove a violation of Va. Code Ann. § 18.2-266 as a predicate to the involuntary manslaughter charge).

☞ ***Practice Pointer:***

Convictions and punishments for both aggravated involuntary manslaughter (Va. Code Ann. § 18.2-36.1) and felony homicide (Va. Code Ann. § 18.2-33) stemming from the death of the same victim do not violate the double jeopardy clause of the Fifth Amendment to the United States Constitution because each statute requires proof of an element that the other does not. *Payne v. Commonwealth, 277 Va. 531, 540–41, 674 S.E.2d 835, 839–40 (2009)* (citing *Blockburger v. U.S., 284 U.S. 299, 304 (1932)*).

☞ ***Practice Pointer:***

Double jeopardy does not bar a conviction for aggravated involuntary manslaughter following a conviction for driving under the influence because each

statute requires proof of additional facts not found in the other. *Davis, 57 Va. App. at 455–58, 703 S.E.2d at 263–65.*

ALERTS:

• "Self-administered intoxicant or drug" includes drugs administered in a voluntary drug treatment program where the defendant agrees to ingest the substance by his participation in the program. *Lambert v. Commonwealth, 70 Va. App. 54, 64, 824 S.E.2d 18, 23 (2019), aff'd, 298 Va. 510, 840 S.E.2d 326 (2020).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12, 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles §§ 10, 11, 18; and Homicide §§ 1–48

Instruction No. 33.700

Lesser Included Offenses

The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant killed (name of person); **and**

(2) That the killing was malicious; and

(3) That the killing was willful, deliberate and premeditated.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of first degree murder [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but you do not find beyond a reasonable doubt that the killing was willful, deliberate and premeditated, then you shall find the defendant guilty of second degree murder [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing was malicious but that the Commonwealth has proved beyond a reasonable doubt that the defendant killed (name of person) **and further:**

(1) That the killing was the result of an intentional act; and

(2) That the killing was committed while [in the sudden heat of passion upon reasonable provocation; in mutual combat];

then you shall find the defendant guilty of voluntary manslaughter [but you shall not fix the punishment until the verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above offenses, then you shall find the defendant not guilty.

(1) That the killing was the result of an intentional act; and

(2) That the killing was committed while in the sudden heat of passion upon reasonable provocation; in mutual combat;

Instruction No. P33.700(a)

Lesser Included Offenses—First Degree Murder

You have found the defendant guilty of the crime of first degree murder.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000; or

(3) A specific term of imprisonment, but not less than twenty (20) years; or

(4) A specific term of imprisonment, but not less than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

Instruction No. P33.700(b)

Lesser Included Offenses—Second Degree Murder

You have found the defendant guilty of the crime of second degree murder.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years.

Instruction No. P33.700(c)

Lesser Included Offenses—Voluntary Manslaughter

You have found the defendant guilty of the crime of voluntary manslaughter.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-266.1.

CASE AUTHORITY:

Porter v. Commonwealth, 276 Va. 203, 242–43, 661 S.E.2d 415, 434–35 (2008); Walshaw. v. Commonwealth, 44 Va. App. 103, 110–22, 603 S.E.2d 633, 636–42 (2004); Gaines v. Commonwealth, 39 Va. App. 562, 565–67, 574 S.E.2d 775, 776–77 (2003); Helmick v. Commonwealth, 38 Va. App. 558, 567–69, 567 S.E.2d 551, 556–57 (2002); Orbe v. Commonwealth, 258 Va. 390, 398–99, 519 S.E.2d 808, 813 (1999); Brandau v. Commonwealth, 16 Va. App. 408, 411–15, 430 S.E.2d 563, 564–67 (1993); Boone v. Commonwealth, 14 Va. App. 130, 132, 415 S.E.2d 250, 251 (1992); Buchanan v. Commonwealth, 238 Va. 389, 409–12, 384 S.E.2d 757, 769–71 (1989).

PRACTICE COMMENTARY: A short form murder indictment under Va. Code Ann. § 19.2-221 need not state the degree of murder alleged. See *Walshaw, 44 Va. App. 103, 603 S.E.2d 633; Simpson v. Commonwealth, 221 Va. 109, 267 S.E.2d 134 (1980).*

If any credible evidence in the record supports it, the jury should be instructed on a lesser included offense. *Dandridge v. Commonwealth, 72 Va. App. 669, 682, 852 S.E.2d 488, 494 (2021)*; *Boone, 14 Va. App. at 132, 415 S.E.2d at 251.* However, in a prosecution for capital murder it was not error to refuse an instruction for the lesser included offense of second degree murder where the evidence of premeditation was clear, substantial, and uncontroverted and where the evidence supporting the lesser included offense instruction did not amount to more than a scintilla. *Porter, 276 Va. at 242–43, 661 S.E.2d at 434–35.* A trial court must instruct the jury on the lesser included offense of voluntary manslaughter if the evidence of heat of passion and reasonable provocation amounts to more than a scintilla. *Dandridge, 72 Va. App. at 683, 852 S.E.2d at 494.*

PRACTICE POINTER:

Voluntary manslaughter is a Class 5 felony.

ALERTS:

• This instruction is suggested as a format for use when a verdict for a lesser included offense may be appropriate. Rarely will it be proper to instruct on involuntary manslaughter as a lesser included offense. See *Bell v. Commonwealth, 167 Va. 526, 189 S.E. 441 (1937).* Therefore, the instruction does not include involuntary manslaughter.

• Malicious wounding is not a lesser included offense of homicide. *Hampton v. Commonwealth, 34 Va. App. 412, 422–23, 542 S.E.2d 41, 46 (2001).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.720

Doubt as to Grade of Offense

You have been instructed on more than one grade of homicide. If you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of the lesser offense.

For example, if you have a reasonable doubt as to whether he is guilty of aggravated murder or first degree murder, you shall find him guilty of first degree murder. If you have a reasonable doubt as to whether he is guilty of first degree murder or second degree murder, you shall find him guilty of second degree murder. If you have a reasonable doubt as to whether he is guilty of second degree murder or voluntary manslaughter, you shall find him guilty of voluntary manslaughter. If you have a reasonable doubt as to whether he is guilty of voluntary manslaughter or involuntary manslaughter, you shall find him guilty of involuntary manslaughter. If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty.

Sources & Authority

Governing Statute:

Va. Code Ann. § 19.2-266.1.

Case Authority:

Witherow v. Commonwealth, 65 Va. App. 557, 566–67, 779 S.E.2d 223, 228 (2015); LeVasseur v. Commonwealth, 225 Va. 564, 589–92, 304 S.E.2d 644, 657–59 (1983); Crockett v. Commonwealth, 187 Va. 687, 696, 47 S.E.2d 377, 381 (1948).

Practice Commentary: In cases in which the evidence is clear and uncontroverted that the killing was willful, deliberate, and premeditated, it is not error to refuse an instruction on the lesser offenses. *Porter v. Commonwealth, 276 Va. 203, 241–43, 661 S.E.2d 415, 434–35 (2008); Arnold v. Commonwealth, 37 Va. App. 781, 789–91, 560 S.E.2d 915, 919–20 (2002); Willis v. Commonwealth, 37 Va. App. 224, 230–32, 556 S.E.2d 60, 64 (2001); Painter v. Commonwealth, 210 Va. 360, 365–66, 171 S.E.2d 166, 170 (1969).*

Practice Pointer:

See Instruction No. 2.740, Form Findings, Felony and Misdemeanor and Instruction No. 33.130, Capital Murder—Verdict Form for sample verdict forms.

ALERTS:

• Normally it will be necessary to delete some sentences because not every grade of homicide will be submitted to the jury. An instruction of this type should include all possible findings supported by the evidence. In *Crockett*, the court held that the "accused was entitled to an instruction giving the evidential matter relied on by him to reduce the crime to the grade justified by his evidence if believed." *187 Va. at 696, 47 S.E.2d at 381.*

• See *McClung v. Commonwealth, 215 Va. 654, 212 S.E.2d 290 (1975)*, where the court held that it was reversible error to refuse an instruction on voluntary manslaughter because the jury could have decided that the killing satisfied the definition of this offense. The *McClung* case was followed in *Hodge v. Commonwealth, 217 Va. 338, 228 S.E.2d 692 (1976)*. In *Hodge*, the court held that, when the defendant produces some credible evidence that he acted in the heat of passion, he is entitled to an instruction on voluntary manslaughter. *Id.* See *Dandridge v. Commonwealth, 72 Va. App. 669, 682, 852 S.E.2d 488, 494 (2021)* (the jury must be instructed on the lesser included offense of voluntary manslaughter if the evidence of heat of passion and reasonable provocation amounts to more than a scintilla).

• If the jury returns a verdict convicting the defendant of a lesser offense than the one charged, it will not be altered: "[T]he verdict of a jury finding an accused guilty of a lesser degree of homicide would not be disturbed, even though the evidence adduced tended to prove murder in the first degree and none other." *Blankenship v. Commonwealth, 193 Va. 587, 592, 70 S.E.2d 335, 337–38 (1952)* (citing *Burton*

v. Commonwealth, 108 Va. 892, 62 S.E. 376 (1908)).

If a defendant who has been found guilty of the lesser offense receives a second trial, the verdict in such a trial cannot exceed the verdict of the original trial with regard to grade. Thus, a defendant who was acquitted of murder but found guilty of involuntary manslaughter cannot subsequently be found guilty of a higher offense, even if the jury at the second trial believes he is guilty of first degree murder. See *Taylor v. Commonwealth, 186 Va. 587, 43 S.E.2d 906 (1947).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.800

Self-Defense—Defendant Without Fault

If you believe that the defendant was without fault in provoking or bringing on the [fight; difficulty], **and you further believe that:**

(1) he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of being killed or that he was in imminent danger of great bodily harm; and

(2) he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm,

then the killing was in self-defense, and you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Lienau v. Commonwealth, 69 Va. App. 254, 818 S.E.2d 58 (2018); Hines v. Commonwealth, 292 Va. 674, 680, 791 S.E.2d 563, 565 (2016); Cortez-Hernandez v. Commonwealth, 58 Va. App. 66, 81, 706 S.E.2d 893, 901 (2011); Commonwealth v. Cary, 271 Va. 87, 98–101, 623 S.E.2d 906, 912–14 (2006); Peeples v. Commonwealth, 30 Va. App. 626, 634–35, 519 S.E.2d 382, 386 (1999); Gilbert v. Commonwealth, 28 Va. App. 466, 472–74, 506 S.E.2d 543, 546–47 (1998); Foster v. Commonwealth, 13 Va. App. 380, 386, 412 S.E.2d 198, 202 (1991); Perricllia v. Commonwealth, 229 Va. 85, 93–94, 326 S.E.2d 679, 684–85 (1985); McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978); Yarborough v. Commonwealth, 217 Va. 971, 975–79, 234 S.E.2d 286, 289–92 (1977); Gordon v. Commonwealth, 212 Va. 413, 413–14, 184 S.E.2d 814, 814 (1971).

PRACTICE COMMENTARY: This instruction should be given when deadly force is used. When no deadly force is used, give Instruction No. 52.500, Self-Defense—Defendant Without Fault. In Virginia, homicide in self-defense is classified as either justifiable or excusable. This instruction is based on the law of justifiable homicide, which requires that the defendant be without fault in bringing on the difficulty. See, e.g., *Yarborough, 217 Va. 971, 234 S.E.2d 286*. This principle is strictly interpreted. The defendant must be totally free of fault, and must not have even remotely contributed to the cause of the difficulty. *Foote v. Commonwealth, 11 Va. App. 61, 67, 396 S.E.2d 851, 855 (1990); Perkins v. Commonwealth, 186 Va. 867, 44 S.E.2d 426 (1947).*

Self-defense is an affirmative defense, and the burden is on the defendant to present evidence of justification or excuse. *Cary, 271 Va. at 99, 623 S.E.2d at 912*; *McGhee, 219 Va. at 562, 248 S.E.2d at 810.*

There is no general rule concerning what constitutes a reasonable belief of imminent harm. The question depends on the facts and circumstances of each particular case. Yet it does not matter if the belief later turns out to be erroneous in that the defendant was not in any real danger. As long as the defendant has reasonable grounds for believing that he is in danger, the killing is justifiable. *Stoneman v. Commonwealth, 66 Va. (25 Gratt.) 887 (1874).*

Furthermore, the test of reasonableness is based on the circumstances of the case as they reasonably appeared to the defendant. *Fortune v. Commonwealth, 133 Va. 669, 112 S.E. 861 (1922).* Thus, it is not a question of what the reasonable man would have believed, but whether the actual belief of the defendant was reasonable in light of the circumstances as he perceived them. *Id.*

Words alone, however, when unaccompanied by any overt acts of aggression, are usually not sufficient to excuse a killing in self-defense. *McCoy v. Commonwealth, 125 Va. 771, 99 S.E. 644 (1919).* The bare fear that another might intend

to commit murder does not justify shooting such a person, unless there is an overt act that also indicates imminent danger from his or her intent to kill. *Id.; Commonwealth v. Sands, 262 Va. 724, 729–30, 553 S.E.2d 733, 736 (2001); Boone v. Commonwealth, 195 Va. 708, 80 S.E.2d 412 (1954).*

In a homicide trial, it is not error to refuse an instruction on self-defense when there is no evidence to support it. *Avent v. Commonwealth, 279 Va. 175, 688 S.E.2d 244 (2010).*

☞ ***PRACTICE POINTER:***

In *Perricllia,* the court held that under certain circumstances it is proper to give the jury two finding instructions on self-defense: one based on the defendant being entirely free from fault, and one based on his being partly at fault in bringing on the difficulty. *229 Va. at 93–94, 326 S.E.2d at 684–85.*

☞ ***PRACTICE POINTER:***

In *Foster*, the court held that the law pertaining to defense of others applies in Virginia where a defendant "reasonably believes, based on the attendant circumstances, that the person defended is [entitled to use self-defense and is] without fault in provoking the fray." *13 Va. App. at 386, 412 S.E.2d at 202.*

! ***ALERTS:***

• The right to use force has nothing to do with the issue of the degree of force that is actually used by the defendant. As explained in *Gordon* and *Gilbert*, the right itself depends solely on whether or not the defendant reasonably feared death or serious bodily harm. *Gilbert, 28 Va. App. 466, 506 S.E.2d 543; Gordon, 212 Va. 413, 184 S.E.2d 814.* As to the degree of force, "the law of self-defense is the law of necessity . . . . The amount of force used must be reasonable in relation to the harm threatened." *Foote v. Commonwealth, 11 Va. App. 61, 69, 396 S.E.2d 851, 856 (1990).*

• A special rule of self-defense applies to a police officer charged with a homicide that occurs during the course of his duties. A police officer cannot kill unless there is actual necessity for it, and it is a jury question whether the officer acted reasonably on the grounds of actual necessity. *Couture v. Commonwealth, 51 Va. App. 239, 250–51, 656 S.E.2d 425, 430–31 (2008)*; *Hendricks v. Commonwealth, 163 Va. 1102, 1109, 178 S.E. 8, 11 (1935). Couture* also furnishes a self-defense instruction based on necessity that was not challenged on appeal. *51 Va. App. at 250, 656 S.E.2d at 431.*

• Since a person has a right to resist an unlawful arrest, self-defense is justified, and the issue is the reasonableness of the force used. *Foote v. Commonwealth, 11 Va. App. 61, 396 S.E.2d 851 (1990).* However, a person does not have a right to resist an unlawful detention by a law enforcement officer. *Commonwealth v. Hill, 264 Va. 541, 570 S.E.2d 805 (2002).*

• The "Defense of Castle" doctrine, as applied in Virginia, provides that "a man is not obligated to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant . . . even to the taking of life."

Hines, 292 Va. at 680, 791 S.E.2d at 565.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others" and "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12, 33.1–33.2

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.810

Self-Defense—Defendant With Fault—Retreat to Wall

If you believe that the defendant was to some degree at fault in provoking or bringing on the [fight; difficulty], **but you further believe that:**

(1) he retreated as far as he safely could under the circumstances in a good faith attempt to abandon the fight; and

(2) he made known his desire for peace by word or act; and

(3) he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of being killed or that he was in imminent danger of great bodily harm; and

(4) he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm,

then the killing was in self-defense, and you shall find the defendant not guilty.

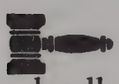
SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Hines v. Commonwealth, 292 Va. 674, 680, 791 S.E.2d 563, 565 (2016); *Cortez-Hernandez v. Commonwealth, 58 Va. App. 66, 81, 706 S.E.2d 893, 901 (2011)*; *Avent v. Commonwealth, 279 Va. 175, 197-98, 688 S.E.2d 244, 256–57 (2010)*; *Connell v. Commonwealth, 34 Va. App. 429, 439–40, 542 S.E.2d 49, 54 (2001)*; *Peeples v. Commonwealth, 30 Va. App. 626, 634–35, 519 S.E.2d 382, 386 (1999)*; *Lynn v. Commonwealth, 27 Va. App. 336, 499 S.E.2d 1 (1998)*; *aff'd, 257 Va. 239, 514 S.E.2d 147 (1999)*; *Smith v. Commonwealth, 17 Va. App. 68, 71–72, 435 S.E.2d 414, 416–17 (1993)*; *Foster v. Commonwealth, 13 Va. App. 380, 386, 412 S.E.2d 198, 202 (1991)*; *Royal v. Commonwealth, 2 Va. App. 59, 66, 341 S.E.2d 660, 664 (1986), rev'd on other grounds, 234 Va. 403, 362 S.E.2d 323 (1987)*; *Perricllia v. Commonwealth, 229 Va. 85, 93–94, 326 S.E.2d 679, 684–85 (1985)*; *Yarborough v. Commonwealth, 217 Va. 971, 975–79, 234 S.E.2d 286, 289–92 (1977)*.



PRACTICE COMMENTARY: This instruction should be given when deadly force is used. When no deadly force is used, give Instruction No. 52.510, Self-Defense—Defendant With Fault—Retreat to Wall.

This type of homicide in self-defense is classified as excusable in Virginia. *Cortez-Hernandez, 58 Va. App. at 81, 706 S.E.2d at 901*. It is different from justifiable homicide in that the defendant must somehow contribute to the disturbance that leads to the killing. *Id.* Nevertheless, although the defendant is at least partially at fault, the homicide will be excusable if he can show that he retreated as far as possible when attacked; that he demonstrated his desire for peace; and that he killed because of a reasonable belief that he was in danger of death or serious bodily harm. *Bailey v. Commonwealth, 200 Va. 92, 104 S.E.2d 28 (1958)*. See also the Practice Commentary to Instruction No. 33.800, Self-Defense—Defendant Without Fault for a discussion of what constitutes a reasonable belief of imminent harm.

This instruction is appropriate in situations where the defendant is the sole cause of the disturbance, as well as in cases of mutual combat. Indeed, it has been said that cases of mutual combat "are those in which this duty of 'retreating to the wall' oftenest appears. Two men being in the wrong, neither can right himself except by 'retreating to the wall.' " *Jackson v. Commonwealth, 98 Va. 845, 850, 36 S.E. 487, 489 (1900)*.

The retreat itself must be made in good faith for the purpose of abandoning the conflict. The defendant cannot retreat in order to establish a better position from which to continue hostilities. *Coleman v. Commonwealth, 184 Va. 197, 35 S.E.2d 96 (1945)*. See also *Lynn, 27 Va. App. 336, 499 S.E.2d 1*.

In *Perricllia* the court held that under certain circumstances it is proper to give

the jury two finding instructions on self-defense, one based on the defendant being entirely free from fault and one based on his being partly at fault in bringing on the difficulty. *229 Va. at 93–94, 326 S.E.2d at 684–85.* See also *Royal, 2 Va. App. 59, 341 S.E.2d 660.*

ALERTS:

• Another type of excusable homicide arises when the defendant is performing a lawful act, and kills another person in a manner that is clearly accidental. See *Valentine v. Commonwealth, 187 Va. 946, 48 S.E.2d 264 (1948).*

• A special rule of self-defense applies to a police officer charged with a homicide that occurs during the course of his duties. A police officer cannot kill unless there is a necessity for it. It is a jury question whether a police officer acted reasonably on the basis of necessity. *Couture v. Commonwealth, 51 Va. App. 239, 250, 656 S.E.2d 425, 431 (2008).* In *Couture,* a jury instruction on necessity was given without objection. Based upon the "law of the case" doctrine, the court assumed—but did not hold—that the instruction contained an accurate statement of the law. *51 Va. App. at 250–51, n.3,656 S.E.2d at 430–31.*

• The "Defense of Castle" doctrine, as applied in Virginia, provides that "a man is not obligated to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant . . . even to the taking of life." *Hines, 292 Va. at 680, 791 S.E.2d at 565 (2016).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others" and "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 3.1–3.12, 33.1–33.2

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.850

Accidental Killing

Where the defense is that the killing was an accident, the defendant is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the killing was not accidental. If after considering all the evidence you have a reasonable doubt whether the killing was accidental or intentional, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Waters v. Commonwealth, 39 Va. App. 72, 78–80, 569 S.E.2d 763, 766–67 (2002), overruled in part by King v. Commonwealth, 64 Va. App. 580, 770 S.E.2d 214 (2015); Helmick v. Commonwealth, 38 Va. App. 558, 567–69, 567 S.E.2d 551, 556–57 (2002); Martin v. Commonwealth, 218 Va. 4, 6–7, 235 S.E.2d 304, 305 (1977); Jones v. Commonwealth, 196 Va. 10, 15, 82 S.E.2d 482, 485 (1954).

PRACTICE COMMENTARY: In *Jones* the evidence raised the question of whether the killing was in self-defense or whether it was accidental. The court said that "if either inference may be reasonably drawn, [the] accused is entitled to have both issues submitted to the jury." *196 Va. at 15, 82 S.E.2d at 485*. Thus, it may be necessary to use this instruction with Instruction Nos. 33.800, Self-Defense—Defendant Without Fault and 33.810, Self-Defense—Defendant With Fault—Retreat to Wall. However, while a killing in self-defense is not ordinarily of such a nature as to support a theory of accidental homicide, there may be facts that would support such a defense. *Lienau v. Commonwealth, 69 Va. App. 254, 271, 818 S.E.2d 58, 66 (2018).*

In *Martin, 218 Va. at 6–7, 235 S.E.2d at 305*, the court specifically addressed the issue of whether the trial court erred in refusing an instruction on the defense of accident:

> In none of the instructions granted by the trial court, however, was the jury told that the burden was upon the Commonwealth to prove the killing was not accidental and that the jury should acquit the defendant if it entertained a reasonable doubt whether the death was accidental or intentional. It was error to refuse an instruction embodying these propositions.

ALERTS:

• This instruction may not be appropriate where involuntary manslaughter is charged.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide" and "Misadventure"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12, 34.3

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.900

Transferred Intent—General

If you believe beyond a reasonable doubt that the defendant intended [to kill; to wound] (name of person) **but that he** [killed; wounded] (name of victim) **by mistake, then that intent is transferred to the** [killing; wounding] of (name of victim).

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Blow v. Commonwealth, 52 Va. App. 533, 541, 665 S.E.2d 254, 258 (2008); Rivers v. Commonwealth, 21 Va. App. 416, 421–27, 464 S.E.2d 549, 551–54 (1995); Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983); Jones v. Commonwealth, 217 Va. 231, 234–37, 228 S.E.2d 127, 129–31 (1976); Williams v. Commonwealth, 128 Va. 698, 717, 104 S.E. 853, 859 (1920).

PRACTICE COMMENTARY: In Virginia, the law does not require that the intent to kill be directed against any specific person. As long as the defendant has the intent to kill somebody when he causes the death of another, then the law will treat the homicide as if the defendant intended to kill the actual victim. This principle was expressed in *Williams, 128 Va. at 717, 104 S.E. at 859*: "If it be an intent to kill any person who may attempt a certain thing, and one is killed because he attempted that thing, the intent is the same as if it were directed against that specific person."

"The doctrine of transferred intent permits a fact finder to transpose a defendant's criminal intent to harm an intended victim to another unintended, but harmed, victim." *Blow, 52 Va. App. at 541, 665 S.E.2d at 258.* "The policy behind the doctrine of transferred intent is to impose criminal liability on a defendant whose intentional act causes harm to an unintended victim; in other words, the defendant is not absolved of criminal responsibility merely because he has the misfortune to harm a bystander rather than his intended victim as a result of his wrongful act." *Id.* In *Blow*, the Court of Appeals rejected a narrow reading of the doctrine of transferred intent that would limit the application of the doctrine to situations where a bystander is injured, but the intended victim escapes injury. *Id. at 544–47, 665 S.E.2d at 259–61.* The court adopted the broader view that the doctrine applies "when any harm comes to an unintended victim as a result of a defendant's volitional act" even when the intended victim is also harmed. *Id. at 545, 665 S.E.2d at 260.*

Where two individuals are acting in concert, they share the same intent. *Riddick, 226 Va. at 248, 308 S.E.2d at 119.* If one has the intent to kill, the other shares it. *Id.* Therefore, regardless of who fired the fatal shot, the doctrine of transferred intent applies to each. *Id.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12, 4.4

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.910

Transferred Intent—Self-Defense

If you believe that the defendant was acting in self-defense as to the actions of (name of person defended against) **at the time he** [killed; wounded] (name of victim) **accidentally, then you shall find him not guilty.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Peeples v. Commonwealth, 30 Va. App. 626, 634–35, 519 S.E.2d 382, 386 (1999); Riddick v. Commonwealth, 226 Va. 244, 248, 308 S.E.2d 117, 119 (1983); Jones v. Commonwealth, 217 Va. 231, 234–37, 228 S.E.2d 127, 129–31 (1976); Williams v. Commonwealth, 128 Va. 698, 717, 104 S.E. 853, 859 (1920).

PRACTICE COMMENTARY: As long as the defendant has valid legal grounds for acting in self-defense when he causes the death of another person, then the law will transfer his excuse or justification so that it applies to the killing of the actual victim:

> If, then, the perpetrator of the homicide or of the assault had no criminal intent in attempting to injure or kill another person, as where the perpetrator was lawfully defending himself from the harm sought to be inflicted upon him by such other person, the fact that, on that occasion, a third person was unintentionally injured or killed by the perpetrator would not make him liable, unless the perpetrator acted carelessly or without regard to the safety of innocent bystanders. 55 A.L.R.3d 620, 622–23 (1974).

Ferdinand S. Tinio, *Annotation, Unintentional killing of or injury to third person during attempted self-defense*, 55 A.L.R.3d 620, 622–23 (1974).

Although there have been few cases that have actually confronted this situation, Virginia generally adheres to the principle articulated above. See, e.g., *Jones, 217 Va. at 234–37, 228 S.E.2d at 129–31; Williams, 128 Va. at 717, 104 S.E. at 859.*

ALERTS:

• In cases of transferred intent that involve self-defense, it will also be necessary to use the appropriate instructions for self-defense. See Instruction Nos. 33.800, Self-Defense—Defendant Without Fault and 33.810, Self-Defense—Defendant With Fault—Retreat to Wall.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others" and "Homicide"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Homicide §§ 1–48

Instruction No. 33.950

Intent—Intoxication Defense

If you find that the defendant was so greatly intoxicated by the voluntary use of [alcohol; drugs] **that he was incapable of deliberating or premeditating, then you cannot find him guilty of** [capital murder; murder in the first degree].

Voluntary intoxication is not a defense to (specify lesser degree of homicide).

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Tisdale v. Commonwealth, 65 Va. App. 478, 482–85, 778 S.E.2d 554, 556–57 (2015); Lawlor v. Commonwealth, 285 Va. 187, 239, 738 S.E.2d 847, 876 (2013); Proctor v. Commonwealth, 40 Va. App. 233, 245, 578 S.E.2d 822, 828 (2003); Arnold v. Commonwealth, 37 Va. App. 781, 789–91, 560 S.E.2d 915, 919–20 (2002); Downing v. Commonwealth, 26 Va. App. 717, 721–23, 496 S.E.2d 164, 166–67 (1998); Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988); LeVasseur v. Commonwealth, 225 Va. 564, 589–92, 304 S.E.2d 644, 657–59 (1983); Giarratano v. Commonwealth, 220 Va. 1064, 1073, 266 S.E.2d 94, 99 (1980); Hatcher v. Commonwealth, 218 Va. 811, 814, 241 S.E.2d 756, 758 (1978); Greenfield v. Commonwealth, 214 Va. 710, 714, 204 S.E.2d 414, 417–18 (1974); Chittum v. Commonwealth, 211 Va. 12, 17–18, 174 S.E.2d 779, 782–83 (1970); Gills v. Commonwealth, 141 Va. 445, 450, 126 S.E. 51, 53 (1925).

PRACTICE COMMENTARY: A person may not premeditate murder and thereafter voluntarily become drunk and then rely upon this principle of law as a defense. See *Reed v. Commonwealth, 98 Va. 817, 828–29, 36 S.E. 399, 403 (1900).*

In the *Greenfield* case the defendant sought to assert drug-induced unconsciousness as a defense to murder. The court held that unconsciousness is a complete defense when not self-induced, but self-induced unconsciousness was distinguishable. *214 Va. at 714, 204 S.E.2d at 417–18; see also Chittum, 211 Va. at 17–18, 174 S.E.2d at 782–83; Gills, 141 Va. at 450, 126 S.E. at 53.*

PRACTICE POINTER:

Temporary insanity triggered by voluntary intoxication is pathological insanity, and is not allowed on the issue of insanity. *Downing, 26 Va. App. at 721–23, 496 S.E.2d at 166–67.*

ALERTS:

• This Instruction should only be given when the defendant is charged with having killed someone after premeditation. The Instruction is not applicable to any other type of first degree murder.

• *Gills* states the longstanding rule that voluntary intoxication is no defense to a crime, unless the defendant was too drunk to be capable of deliberation and premeditation. *141 Va. at 450, 126 S.E. at 53.* In such circumstances, he may be convicted only of second degree murder. *Id.* This rule has been repeatedly reaffirmed. See, e.g., *Giarratano, 220 Va. at 1073, 266 S.E.2d at 99; Chittum, 211 Va. at 18, 174 S.E.2d at 783.*

• In *Tisdale*, the Court of Appeals of Virginia held that evidence of voluntary intoxication is not relevant as a defense to murder by lying in wait, which does not have premeditation as an element. *65 Va. App. 478, 778 S.E.2d 554 (2015).* Rather,

it is a defense only to first degree murder based on a deliberate, premeditated killing. *Id.*

• "To justify an instruction on voluntary drunkenness, however, the evidence must show more than mere drinking of alcohol." *Hatcher, 218 Va. at 814, 241 S.E.2d at 758.* See also *Lawlor, 285 Va. 187, 738 S.E.2d 847; Royal v. Commonwealth, 2 Va. App. 59, 341 S.E.2d 660 (1986), rev'd on other grounds, 234 Va. 403, 362 S.E.2d 323 (1987); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Homicide" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 3.1–3.12

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1, 2, 3, 11, 12, 13; and Homicide §§ 1–48

CHAPTER 34

ILLEGAL GAMBLING

Scope Note

Instruction No. 34.100 **Illegal Gambling—General**

Instruction No. 34.200 **Operating Illegal Gambling Enterprise**

Instruction No. P34.200 **Operating Illegal Gambling Enterprise**

Instruction No. 34.220 **Operating Illegal Gambling Enterprise for More Than Thirty Days or With Daily Gross Revenue of $2,000 or More**

Instruction No. P34.220 **Operating Illegal Gambling Enterprise for More Than Thirty Days or With Daily Gross Revenue of $2,000 or More**

Instruction No. 34.230 **Definition of Illegal Gambling**

Instruction No. 34.240 **Definition of Operator**

Instruction No. 34.250 **Definition of Gross Revenue**

Instruction No. 34.300 **Accessory to Gambling Activity**

Instruction No. P34.300 **Accessory to Gambling Activity**

SCOPE NOTE

Instructions have been provided for illegal gambling. The first is based on Va. Code Ann. §§ 18.2-325 and 18.2-326 and covers the essential elements. The second and third deal with operating an illegal gambling operation; the statutory reference for each is Va. Code Ann. § 18.2-328. The fourth instruction defines the terms "operator" and "operator of an illegal gambling enterprises" based on Va. Code Ann. § 18.2-325 and case law. The fifth instruction, based on Va. Code Ann. § 18.2-325(4) defines the term "operator." The sixth instruction, based on Va. Code Ann. § 18.2-328, defines the term "gross revenue." The seventh instruction, based on Va. Code Ann. § 18.2-330, covers the crime of being an accessory to gambling activity.

Other statutory provisions in regard to gambling are found in Chapter 8, Article 1, of Title 18.2. Should it be necessary to draft instructions in accordance with these other provisions, the instructions herein can be changed by substituting the appropriate statutory language.

Instruction No. 34.100

Illegal Gambling—General

The defendant is charged with the crime of illegal gambling. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant made, placed, or received in the Commonwealth of Virginia a bet or wager of money or other thing of value; and

(2) The bet or wager was in exchange for a chance to win money or other thing of value and depended on the result of a game, contest, or any event the outcome of which is uncertain or a matter of chance.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty [and fix his punishment at a fine of a specific amount, but not more than $500].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the offense, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-325, 18.2-326.

CASE AUTHORITY:

Shumate v. Commonwealth, 56 Va. (15 Gratt.) 653, 660 (1860).

PRACTICE COMMENTARY: The court defined the term "bet" in its *Shumate* decision:

> It is true, that a bet does imply risk, but it does not necessarily imply risk in *both* parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss. (Emphasis added.)

56 Va. (15 Gratt.) at 660 (emphasis added).

A bet or wager of money or other thing of value includes the purchase of a product, Internet access, or other thing, which credits the purchaser with free points or other measurable units that may be (1) risked by the purchaser for an opportunity to win additional points or other measurable units redeemable by the purchaser for money or (2) redeemed by the purchaser for money, and but for the free points or other measurable units, the purchase of the product, Internet access, or other thing (a) would be of insufficient value in and of itself to justify the purchase or (b) is merely incidental to the chance to win money. Va. Code Ann. § 18.2-325(1).

Va. Code Ann. § 18.2-325 includes in the definition of "illegal gambling" the playing or offering for play of any skill game, where "skill" means the knowledge, dexterity, or any other ability or expertise of a natural person. Va. Code § 18.2-334.5 provides exemptions to certain skill games, such as coin-operated amusement games and family entertainment centers.

There are a number of statutorily authorized forms of gambling which would not be violative of these "illegal gambling" statutes. With respect to wagering on horse racing, see Va. Code Ann. § 18.2-32.6. Bingo games, raffles, and duck races are exempted, (See Va. Code Ann. § 18.2-334.2)., as is the state lottery, Va. Code Ann. § 18.2-334.4.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Gambling"

MICHIE'S JURISPRUDENCE, Gaming and Gaming Contracts § 4

Instruction No. 34.200

Operating Illegal Gambling Enterprise

The defendant is charged with the crime of operating an illegal gambling enterprise, activity or operation. The Commonwealth must prove beyond a reasonable doubt that the defendant was the operator of an illegal gambling enterprise.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P34.200

Operating Illegal Gambling Enterprise

You have found the defendant guilty of the crime of operating an illegal gambling enterprise, activity or operation.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-328.

CASE AUTHORITY:

Turner v. Commonwealth, 226 Va. 456, 459–62, 309 S.E.2d 337, 338–40 (1983).

PRACTICE COMMENTARY: For definitions of "illegal gambling," "gambling device," and "operator," see Va. Code Ann. § 18.2-325. For an instruction on aiding, abetting or assisting in operating an illegal gambling activity, see Instruction No. 34.300.

In *Turner* the Supreme Court of Virginia explained that an "operator" of an illegal gambling enterprise is one who leads and controls the enterprise as distinguished from one who merely engages or participates in it. *Turner, 226 Va. at 461, 309 S.E.2d at 339.*

Va. Code Ann. § 18.2-333 provides that skill be considered in determining whether Va. Code Ann. § 18.2-328 has been violated. *Daniels v. Mobley, 285 Va. 402, 413, 737 S.E.2d 895, 901 (2013)* (affirming trial court's holding that Va. Code Ann. § 18.2-328 is constitutionally valid). Va. Code Ann. § 18.2-325 includes in the definition of "illegal gambling" the playing or offering for play of any skill game, where "skill" means the knowledge, dexterity, or any other ability or expertise of a natural person. Va. Code Ann. § 18.2-334.5 provides exemptions to certain skill games, such as coin-operated amusement games and family entertainment centers.

PRACTICE POINTER:

See Instruction No. 34.220 regarding the operation of an illegal gambling operation continuously for more than thirty (30) days or with a daily gross revenue of $2,000 or more.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Gambling"

MICHIE'S JURISPRUDENCE, Gaming and Gaming Contracts § 4

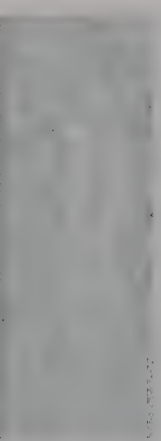
Instruction No. 34.220

Operating Illegal Gambling Enterprise for More Than Thirty Days or With Daily Gross Revenue of $2,000 or More

The defendant is charged with the crime of operating an illegal gambling enterprise, activity or operation [continuously for a period of time in excess of thirty (30) days; having a gross revenue of $2,000 or more in a single day]. **The Commonwealth must prove beyond a reasonable doubt that the defendant was the operator of an illegal gambling enterprise** [continuously for a period of time in excess of thirty (30) days; having a gross revenue of $2,000 or more in a single day].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the offense beyond a reasonable doubt, then you shall find the defendant not guilty.



Instruction No. P34.220

Operating Illegal Gambling Enterprise for More Than Thirty Days or With Daily Gross Revenue of $2,000 or More

You have found the defendant guilty of the crime of operating an illegal gambling enterprise, activity or operation [continuously for a period of time in excess of thirty (30) days; having a gross revenue of $2,000 or more in a single day].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than ten (10) years, and a fine of a specific amount, but not more than $20,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-328.

CASE AUTHORITY:

Dingus v. Commonwealth, 23 Va. App. 382, 386–89, 477 S.E.2d 303, 305–06 (1996); Turner v. Commonwealth, 226 Va. 456, 459–62, 309 S.E.2d 337, 338–40.(1983).

PRACTICE COMMENTARY: For definitions of "illegal gambling," "gambling device," and "operator," see Va. Code Ann. § 18.2-325. As to punishment of those who knowingly aid, abet or assist in operating an illegal gambling activity, see Va. Code Ann. § 18.2-330.

ALERTS:

• See Instruction No. 34.200, which deals with the general offense of operating an illegal gambling enterprise. It may be necessary to give both instructions in a given case; if so, the phrase "of this offense" should be added at the end of the last paragraph of this instruction.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Gambling"

MICHIE'S JURISPRUDENCE, Gaming and Gaming Contracts § 4

Instruction No. 34.230

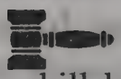
Definition of Illegal Gambling

"Illegal gambling" means the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-325(1).



PRACTICE COMMENTARY: Va. Code Ann. § 18.2-333 provides that skill be considered in determining whether Va. Code Ann. § 18.2-328 has been violated. *Daniels v. Mobley, 285 Va. 402, 413, 737 S.E.2d 895, 901 (2013)* (affirming trial court's holding that Va. Code Ann. § 18.2-328 is constitutionally valid). Va. Code Ann. § 18.2-325 includes in the definition of "illegal gambling" the playing or offering for play of any skill game, where "skill" means the knowledge, dexterity, or any other ability or expertise of a natural person. Va. Code Ann. § 18.2-334.5 provides exemptions to certain skill games, such as coin-operated amusement games and family entertainment centers.

Instruction No. 34.240

Definition of Operator

The term "Operator" includes any person, firm or association of persons, who conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling enterprise, activity or operation.

An "operator" of an illegal gambling enterprise is one who leads and controls the enterprise as distinguished from one who merely engages or participates in it.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-325(4).

CASE AUTHORITY:

Turner v. Commonwealth, 226 Va. 456, 461, 309 S.E.2d 337, 339 (1983).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Gambling"

MICHIE'S JURISPRUDENCE, Gaming and Gaming Contracts § 4

Instruction No. 34.250

Definition of Gross Revenue

The term "gross revenue" means the total amount of illegal gambling transactions handled, dealt with, received by, or placed with such operation, as distinguished from any net figure or amount from which deductions are taken, without regard to whether money or any other thing of value actually changes hands.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-328.

Instruction No. 34.300

Accessory to Gambling Activity

The defendant is charged with the crime of being an accessory to gambling activity. The Commonwealth must prove beyond a reasonable doubt that the defendant did knowingly aid, abet or assist in the operation of an illegal gambling enterprise, activity or operation.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the offense as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the offense beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P34.300

Accessory to Gambling Activity

You have found the defendant guilty of being an accessory to gambling activity.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-330.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: See *Turner v. Commonwealth, 226 Va. 456, 309 S.E.2d 337 (1983)*, distinguishing operators from participants in illegal gambling activities.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES & DEFENSES IN VIRGINIA, "Gambling"

MICHIE'S JURISPRUDENCE, Gaming and Gaming Contracts § 13

CHAPTER 35

INTERFERENCE WITH JUSTICE

Scope Note

Instruction No. 35.100 Obstructing Justice (Law Enforcement Officer)

Instruction No. P35.100 Obstructing Justice (Law Enforcement Officer)

Instruction No. 35.200 Arrest—Definition

Instruction No. 35.220 Lawful Discharge of Duty in Making Arrest—Definition

Instruction No. 35.300 Obstructing Administration of Justice—Felony

Instruction No. P35.300 Obstructing Administration of Justice—Felony

Instruction No. 35.400 Giving False Reports to Law Enforcement Officials

Instruction No. P35.400 Giving False Reports to Law Enforcement Officials

Instruction No. 35.600 Failure to Appear

Instruction No. P35.600 Failure to Appear

Instruction No. 35.700 Obstruction—Resisting Execution of Legal Process

Instruction No. P35.700 Obstruction—Resisting Execution of Legal Process

Instruction No. 35.800 Sex Offender—False Information, Failure to Register, Re-register, or Verify Registration Information—Felony

Instruction No. P35.800 Sex Offender—False Information, Failure to Register, Re-register, or Verify Registration Information—Felony

Instruction No. 35.900 Giving False Identity to Law Enforcement Officer

Instruction No. P35.900 Giving False Identity to Law Enforcement Officer

SCOPE NOTE

This Chapter is primarily based on statutes found in Title 18.2, Chapter 10, Article 6 of the Code entitled, "Interference with Administration of Justice." The instructions in this Chapter cover only those crimes thought most likely to result in jury trials.

There are various fact patterns which constitute obstruction of justice under Va. Code Ann. § 18.2-460. Instruction Nos. 35.100 and 35.300 cover only two of them. Instruction No. 35.100 deals with an attempt, by threat or force, to impede or intimidate a law enforcement officer lawfully engaged in the performance of his duties, a Class 1 misdemeanor under Va. Code Ann. § 18.2-460(B). Instruction No. 35.300 covers an attempt, by threat of bodily harm or force, to obstruct or impede the administration of justice in any court relating to a violent felony offense and certain drug and gang-related offenses listed in the statute, a Class 5 felony under Va. Code Ann. § 18.2-460(C).

Instruction No. 35.200 defines the term arrest, and Instruction No. 35.220 sets forth the requirement of lawful discharge of duty in making an arrest.

Instruction No. 35.400 deals with the crime of giving false reports to law enforcement officials, based on Va. Code Ann. § 18.2-461.

Instruction No. 35.600 covers failure to appear in court, based on Va. Code Ann. § 19.2-128(B).

Instruction No. 35.700 concerns resisting or obstructing execution of legal process, based on Va. Code Ann. § 18.2-409.

Instruction No. 35.800 covers failure to register, re-register, or verify registration information as a sex offender, based on Va. Code Ann. § 18.2-472.1.

Crimes included within this chapter for which no instructions have been drafted include: Unlawful disclosure of existence of order authorizing wire or oral interception of communication, Va. Code Ann. § 18.2-460.1; concealing or compounding offenses, Va. Code Ann. § 18.2-462; use of police radio during commission of crime, Va. Code Ann. § 18.2-462.1; refusal to aid officer in execution of his office, Va. Code Ann. § 18.2-463; failure to obey order of conservator of the peace, Va. Code Ann. § 18.2-464; officer corruptly summoning juror, Va. Code Ann. § 18.2-465; penalizing employee for court appearance or jury duty, Va. Code Ann. § 18.2-465.1; corruptly procuring or attempting to procure the summoning of a juror, Va. Code Ann. § 18.2-466; fraud in regard to drawing of jurors, Va. Code Ann. § 18.2-467; making sound recordings of jury deliberations, Va. Code Ann. § 18.2-468; officer refusing, delaying, etc., to execute process for criminal, Va. Code Ann. § 18.2-469; extortion by officer, Va. Code Ann. § 18.2-470; fraudulent issue of fee bills, Va. Code Ann. § 18.2-471; willful destruction of human biological evidence, Va. Code Ann. § 18.2-471.1; and false entries or destruction of records by officers, Va. Code Ann. § 18.2-472.

Instruction No. 35.100

Obstructing Justice (Law Enforcement Officer)

The defendant is charged with the crime of obstructing justice. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant by [threats; force]

(2) Knowingly attempted to [intimidate; impede] **a law enforcement officer**

(3) While the law enforcement officer was lawfully engaged in duties as a law enforcement officer.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P35.100

Obstructing Justice (Law Enforcement Officer)

You have found the defendant guilty of the crime of obstructing a law enforcement officer.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-460(B).

CASE AUTHORITY:

Hamilton v. Commonwealth, 69 Va. App., 176, 817 S.E.2d 343 (2018); Thorne v. Commonwealth, 66 Va. App. 248, 254-59, 784 S.E.2d 304, 307-10 (2016); Molinet v. Commonwealth, 65 Va. App. 572, 779 S.E.2d 231 (2015); Testa v. Commonwealth, 55 Va. App. 275, 285, 685 S.E.2d 213, 217–18 (2009); Washington v. Commonwealth, 273 Va. 619, 624–29, 643 S.E.2d 485, 487–90 (2007); Jordan v. Commonwealth, 273 Va. 639, 647–49, 643 S.E.2d 166, 171–72 (2007); Mannix v. Commonwealth, 31 Va. App. 271, 280–81, 522 S.E.2d 885, 890 (2000); Brown v. Commonwealth, 27 Va. App. 111, 118, 497 S.E.2d 527, 530 (1998); Henry v. Commonwealth, 21 Va. App. 141, 146–47, 462 S.E.2d 578, 580–81 (1995); Woodson v. Commonwealth, 245 Va. 401, 406, 429 S.E.2d 27, 30 (1993); Polk v. Commonwealth, 4 Va. App. 590, 593–95, 358 S.E.2d 770, 772–73 (1987); Love v. Commonwealth, 212 Va. 492, 494–96, 184 S.E.2d 769, 771–72 (1971); Rhodes v. Commonwealth, 182 Va. 39, 40–41, 27 S.E.2d 899, 899–900 (1943); Jones v. Commonwealth, 141 Va. 471, 478–79, 126 S.E. 74, 76-77 (1925).

PRACTICE COMMENTARY: The instruction covers only Va. Code Ann. § 18.2-460(B). If the defendant's actions merely make the officer's task more difficult, but do not impede or prevent the officer from performing a particular task, the defendant is not guilty of obstruction of justice. *Jordan, 273 Va. at 648, 643 S.E.2d at 171*. See also *Jones, 141 Va. at 478–79, 126 S.E. at 77*. Furthermore, the prosecution must show that the defendant's conduct involved the use of force. *Jordan, 273 Va. at 648, 643 S.E.2d at 171–72* (defendant's act of removing a roll of cash the officer had seized from the defendant from its location in between the seats in the police vehicle was not the type of "force" contemplated by Va. Code Ann. § 18.2-460(C)).

In *Jones, 141 Va. at 478, 126 S.E.2d at 76–77*, the Supreme Court of Virginia commented that "flight is not such an offense as will make a person amenable to the charge of resisting or obstructing an officer who is attempting to make an arrest, as there is a broad distinction between avoidance and resistance or obstruction." Thus, when the defendant threw a bushel bag into the road while an officer was pursuing him in his car, the court held that this was not an obstruction.

The reasoning in *Jones* was followed in *Love*, where the Court upheld the conviction of a defendant who would not put down his gun when ordered to do so by a police officer. By forcing the officer to draw his revolver, the defendant was guilty of an obstruction. *212 Va. at 495–96, 184 S.E.2d at 771–72*.

In *Rhodes, 182 Va. at 41, 27 S.E.2d at 899–900*, the Court reversed the conviction of a defendant who had threatened an officer with bodily harm, because there was evidence to support the defendant's belief that the men outside his door

were those who had threatened him on the road shortly before.

☞ ***PRACTICE POINTER:***

See Instruction No. 37.340 for assault and battery of law enforcement officers and judges engaged in the performance of their duties. *Va. Code Ann. § 18.2-57.*

Va. Code Ann. § 18.2-460(A) prohibits one, without just cause, from knowingly obstructing a law enforcement officer (or other named official) in the performance of his duties. This subsection, unlike Va. Code Ann. 18.2-460(B), does not require use of threats or force. A violation constitutes a Class 1 misdemeanor.

The evidence was sufficient to support a conviction under Va. Code Ann. § 18.2-460(A) where the defendant refused to step away from an active crime scene investigation despite a request from a backup police officer to do so, and made an aggressive move toward the officer. The defendant's conduct prevented the officer from maintaining a secure perimeter at the investigation scene. *See Molinet, 65 Va. App. at 578, 779 S.E.2d at 234.*

The defendant was guilty of violating Va. Code Ann. § 18.2-460(A) where she refused to comply with a police officer's five requests that she roll down the window of her car so he could check the degree of tinting of the vehicle's windows. *Thorne, 66 Va. App. at 257–58, 784 S.E.2d at 309.* The defendant only rolled down the window after the passage of nine minutes and the arrival of a backup officer. *Id. at 257, 784 S.E.2d at 309.* The Court of Appeals of Virginia held that the defendant's actions "did more than merely make the officer's tasks more difficult." *Id. at 256–57, 784 S.E. 2d at 308–09.*

Lying to law enforcement officers during a consensual encounter or failing to admit them to one's home on request does not constitute obstruction of justice under Va. Code Ann. § 18.2-460(A). *Maldonado v. Commonwealth, 70 Va. App. 554, 570, 829 S.E.2d 570, 577-78 (2019).*

! ***ALERTS:***

• If the acts proscribed by Va. Code Ann. § 18.2-460 relate to a violation or conspiracy to violate Va. Code Ann. §§ 18.2-248 or 18.2-248.1(A)(3), (B) or (C) (distribution, etc., of certain drugs), or to a violation or conspiracy to commit any of the violent felonies listed in Va. Code Ann. § 17.1-805(C), the crime is a Class 5 felony. See Instruction No. 35.300.

• In cases that involve arrests, it will be necessary to use this instruction in conjunction with Instruction Nos. 35.200 and 35.220, which define "arrest" and "lawful discharge of duty in making arrest."

• This instruction is based on only one of many situations covered by Va. Code Ann. § 18.2-460. See the statute for complete coverage.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice" and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 27.1–27.5,

27.7–27.9

MICHIE'S JURISPRUDENCE, Arrest §§ 3–11; and Obstructing Justice §§ 1–4

Instruction No. 35.200

Arrest—Definition

An arrest occurs when an officer physically restrains an individual or when the individual submits to the authority of the officer.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Hall v. Commonwealth, 280 Va. 566, 570–71, 701 S.E.2d 68, 70–71(2010); Bristol v. Commonwealth, 272 Va. 568, 573–74, 636 S.E.2d 460, 463 (2006); White v. Commonwealth, 267 Va. 96, 104, 591 S.E.2d 662, 666 (2004); Howard v. Commonwealth, 210 Va. 674, 677, 173 S.E.2d 829, 832 (1970).

PRACTICE COMMENTARY: In most cases, an arrest is made by the actual restraint of the person or by his submission to the custody of the officer. *Howard, 210 Va. at 677, 173 S.E.2d at 832.*

Submitting to a blood test in a hospital did not constitute an arrest even when the officer told the defendant he was under arrest because the officer never restrained the defendant's movement and defendant voluntarily left the hospital later that day. *Bristol, 272 Va. at 574, 636 S.E.2d at 463.*

ALERTS:

• When a police officer briefly detains a person solely for purposes of investigation, the detention is not viewed as an arrest. *Terry v. Ohio, 392 U.S. 1 (1968).*

• This instruction does not apply to a citizen's arrest.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.1–27.5, 27.7–27.9

MICHIE'S JURISPRUDENCE, Arrest §§ 3–11; and Obstructing Justice §§ 1–4

Instruction No. 35.220

Lawful Discharge of Duty in Making Arrest—Definition

The lawful discharge of duty in making an arrest requires (1) that the officer making the arrest has the authority to do so and (2) that the conduct of the officer in making the arrest is lawful.

An officer has the authority to make an arrest [when he has in his possession a warrant for the arrest of the person he is seeking to arrest; when he has reasonable grounds or probable cause to believe that the person he is seeking to arrest has committed, or been charged with, a felony; when he observes a crime being committed in his presence by the person he is seeking to arrest; when there is probable cause based upon a reasonable complaint of a person who has observed a misdemeanor involving shoplifting, even though the offense was not committed in the officer's presence; when there is probable cause based upon a reasonable complaint of a person who has observed a misdemeanor involving carrying a weapon on school property, property open to the public which is being used for a school sponsored function or a school bus, even though the offense was not committed in the officer's presence].

An officer having the authority to make an arrest must be in uniform or must display his badge to the person he is seeking to arrest. The officer may use whatever force is reasonably necessary to arrest a person. He is not required to inform the person of the charges against him until that person has been arrested.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 16.1-246, 19.2-73, 19.2-81.

CASE AUTHORITY:

Roseborough v. Commonwealth, 281 Va. 233, 238–39, 704 S.E.2d 414, 416–17 (2011); *Brown v. Commonwealth, 27 Va. App. 111, 116–17, 497 S.E.2d 527, 529–30 (1998)*; *Shears v. Commonwealth, 23 Va. App. 394, 398–99, 477 S.E.2d 309, 311 (1996)*; *Johnson v. Commonwealth, 20 Va. App. 49, 55, 455 S.E.2d 261, 264–65 (1995)*; *Penn v. Commonwealth, 13 Va. App. 399, 402–05, 412 S.E.2d 189, 190–93 (1991), aff'd, 244 Va. 218, 420 S.E.2d 713 (1992)*; *Foote v. Commonwealth, 11 Va. App. 61, 66–67, 396 S.E.2d 851, 854–55 (1990)*; *Durant v. City of Suffolk, 4 Va. App. 445, 447–48, 358 S.E.2d 732, 733–34 (1987)*; *Guthrie v. Commonwealth, 212 Va. 602, 605, 186 S.E.2d 68, 71 (1972)*; *Love v. Commonwealth, 212 Va. 492, 495–96, 184 S.E.2d 769, 772 (1971)*; *Galliher v. Commonwealth, 161 Va. 1014, 1020–21, 170 S.E. 734, 736 (1933)*; *Crosswhite v. Barnes, 139 Va. 471, 477–84, 124 S.E. 242, 244–46 (1924)*; *Looney v. Commonwealth, 115 Va. 921, 931, 78 S.E. 625, 628 (1913)*.

PRACTICE COMMENTARY: In the absence of a warrant, the validity of an arrest is determined by whether the officer, at the time of the arrest, had knowledge of facts and circumstances that would lead a reasonable person to believe that an offense had been committed. *Guthrie, 212 Va. at 605, 186 S.E.2d at 71*.

Certain other specified circumstances under which a person may be taken into custody are set forth in Va. Code Ann. § 19.2-81 and under which a child may be taken into custody are contained in Va. Code Ann. § 16.1-246. Any such circumstances should be set forth in the second paragraph of the instruction in those cases in which they are applicable.

An offense is committed in the presence of an officer when the officer has direct personal knowledge, through his sight, hearing, or other senses, that it is then and there being committed. *Galliher, 161 Va. at 1021, 170 S.E.2d at 736*.

☞ ***PRACTICE POINTER:***

It is not necessary to inform the accused of the charges against him until after he has submitted to the arrest; and an officer who is in possession of a warrant is only required to advise the accused that he has a warrant for his arrest. *Love, 212 Va. at 495, 184 S.E.2d at 772*. Yet, when the officer is in possession of a warrant, he must show it to the accused if he is requested to do so. *Crosswhite, 139 Va. at 478, 124 S.E. at 244*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice" and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.1–27.5, 27.7–27.9

MICHIE'S JURISPRUDENCE, Arrest §§ 3–11; and Obstructing Justice §§ 1–4

Instruction No. 35.300

Obstructing Administration of Justice—Felony

The defendant is charged with the crime of attempting to obstruct the administration of justice. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant knowingly attempted to** [obstruct; impede] **the administration of justice in** (name of court)**; and**

(2) **That the defendant did so by** [threat of bodily harm; force]**; and**

(3) **That at the time of the defendant's obstruction, the** [judge; magistrate; justice; juror; witness; attorney for the Commonwealth or law enforcement officer] **was engaged in the discharge of a duty that related to** [a violation of (statute listed in Va. Code Ann. § 18.2-460(C)); a conspiracy to violate (statute listed in Va. Code Ann. § 18.2-460(C))].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P35.300

Obstructing Administration of Justice—Felony

You have found the defendant guilty of the crime of attempting to obstruct the administration of justice.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-460(C).

CASE AUTHORITY:

Roach v. Commonwealth, 51 Va. App. 741, 750, 660 S.E.2d 348, 352 (2008); Washington v. Commonwealth, 273 Va. 619, 624–29, 643 S.E.2d 485, 487–90 (2007); Jordan v. Commonwealth, 273 Va. 639, 648–49, 643 S.E.2d 166, 171–72 (2007); Wise v. Commonwealth, 49 Va. App. 344, 358–59, 641 S.E.2d 134, 141–42 (2007); Craddock v. Commonwealth, 40 Va. App. 539, 552–53, 580 S.E.2d 454, 461 (2003); Turner v. Commonwealth, 20 Va. App. 713, 717–19, 460 S.E.2d 605, 607–08 (1995).

PRACTICE COMMENTARY: The statutes listed in Va. Code Ann. § 18.2-460(C) that make the offense a felony are Va. Code Ann. § 18.2-248 (manufacturing, selling, possession, etc., of certain controlled substances), Va. Code Ann. § 18.2-248.1(a)(3), (b) and (c) (sale, gift, distribution, etc. of marijuana), Va. Code Ann. § 18.2-46.2 (criminal street gang participation), Va. Code Ann. § 18.2-46.3 (recruitment of persons for criminal street gang), and Va. Code Ann. § 17.1-805(C) (violent felony offenses). Other obstructions of justice by force or threats are Class 1 misdemeanors and the instruction should be modified accordingly.

If the defendant's actions make the officer's task more difficult, but do not impede or prevent the officer from performing a particular task, the defendant is not guilty of obstruction of justice. *Jordan, 273 Va. at 648, 643 S.E.2d at 171.* See also *Jones v. Commonwealth, 141 Va. 471, 478–79, 126 S.E. 74, 77 (1925).* Furthermore, the prosecution must show that the defendant's conduct involved the use of force. *Jordan, 273 Va. at 648–49, 643 S.E.2d at 171–72* (defendant's act of removing a roll of cash the officer had seized from the defendant from its location in between the seats in the police vehicle was not the type of "force" contemplated by Va. Code Ann. § 18.2-460(C)).

Va. Code Ann. § 18.2-460(C) is not facially invalid because the type of speech at issue, speech that contains a threat of harm, can be proscribed under the First Amendment. *Wise, 49 Va. App. at 355, 641 S.E.2d at 140.* Accordingly, the Court of Appeals held that the statute "is not constitutionally overbroad" and that it was "not unconstitutional as applied to the facts" considered in *Wise*. *Id.* at 359, 641 S.E.2d at 142.

A person violates Va. Code Ann. § 18.2-460(C) if he attempts any prohibited action under Va. Code Ann. § 17.1-805. *Tanner v. Commonwealth, 72 Va. App. 86, 100–102, 384–385 (2021).*

☞ ***PRACTICE POINTER:***

See the Practice Commentary to Instruction No. 35.100 for a detailed discussion of some of the leading cases that involve the crime of obstructing a law

enforcement officer.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice" and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.1–27.5, 27.7–27.9

MICHIE'S JURISPRUDENCE, Arrest §§ 3–11; and Obstructing Justice §§ 1–4

Instruction No. 35.400

Giving False Reports to Law Enforcement Officials

The defendant is charged with the crime of giving a false report to a law enforcement official. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant gave a false report to a law enforcement official; and

(2) That the report was about the commission of a crime; and

(3) That the defendant knew the report was false; and

(4) That the defendant intended to mislead the law enforcement official.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P35.400

Giving False Reports to Law Enforcement Officials

You have found the defendant guilty of the crime of giving a false report to a law enforcement official.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-461.

CASE AUTHORITY:

Dunne v. Commonwealth, 66 Va. App. 24, 31–32, 782 S.E.2d 170, 173–74 (2016).

PRACTICE COMMENTARY: The statute also contains provisions regarding: (1) causing another to give a false report to law-enforcement officials under certain circumstances (Va. Code Ann. § 18.2-461(ii); and, (2) the calling or summoning of a law enforcement official by telephone or other means, including the engagement or activation of an automatic emergency alarm, without just cause and with the intent to interfere with the performance of any law enforcement official (Va. Code Ann. § 18.2-461(iii). In such cases, the instruction should be modified accordingly.

Virginia Code Ann. § 18.2-461 prohibits the false report of "any crime." "Any crime" is not limited to crimes under Virginia law. *Dunne, 66 Va. App. at 31–32, 782 S.E.2d at 173–74.*

"Any crime" does not require a perfect allegation of a criminal act or a conviction. The existence of defenses to the accusation of the crime does not decriminalize a false report of the crime. *Dunne, 66 Va. App. at 31, 782 S.E.2d at 173.*

One may give a "report" without initiating contact with law enforcement. Where the defendant initially advised acquaintances of a purported offense, but then affirmed her allegations when questioned by the State Police, she made a "report" to law enforcement as contemplated by the statute. *Dunne, 66 Va. App. at 33–34, 782 S.E.2d at 174–75.*

ALERTS:

• In addition to this section, it is a crime for anyone to knowingly and willfully make a materially false statement to a law enforcement officer who is investigating a crime by another. (Va. Code Ann. § 18.2-460(D).

• If a person intentionally gives a false report or causes another to give a false report as to the commission of a crime to a law enforcement official, or calls or summons any law enforcement officer against another person because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin, the person is guilty of a Class 6 felony. Va. Code Ann. § 18.2-461. If applicable, this instruction should be modified accordingly.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice" and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 27.1–27.5, 27.7–27.9

MICHIE'S JURISPRUDENCE, Arrest §§ 3–11; and Obstructing Justice §§ 1–4

Instruction No. 35.600

Failure to Appear

The defendant is charged with the crime of failure to appear in court. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was [charged with; convicted of] **a** [misdemeanor; felony]**; and**

(2) That the defendant was required to appear on (date) **before** (name of court)**; and**

(3) That the defendant willfully failed to appear before (name of court)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P35.600

Failure to Appear

You have found the defendant guilty of the crime of failure to appear in court.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 19.2-128(B), (C).

CASE AUTHORITY:

Merritt v. Commonwealth, 69 Va. App. 452, 458, 820 S.E.2d 379, 382 (2018); *Chavez v. Commonwealth, 69 Va. App. 149, 158–66, 817 S.E.2d 330, 335–337 (2018)*; *Johnson v. Commonwealth, 292 Va. 738, 741–44, 793 S.E.2d 321, 323–24 (2016)*; *Williams v. Commonwealth, 57 Va. App. 750, 762–64, 706 S.E.2d 530, 536–37 (2011)*; *Bowling v. Commonwealth, 51 Va. App. 102, 107–10, 654 S.E.2d 354, 357–58 (2007)*; *Nelson v. Commonwealth, 50 Va. App. 413, 419–20, 650 S.E.2d 562, 565–66 (2007)*; *Thomas v. Commonwealth, 48 Va. App. 605, 609, 633 S.E.2d 229, 231 (2006)*; *Edmonds v. Commonwealth, 43 Va. App. 197, 200, 597 S.E.2d 210, 211–12 (2004)*; *Hunter v. Commonwealth, 15 Va. App. 717, 721–24, 427 S.E.2d 197, 200–02 (1993)*.

PRACTICE COMMENTARY: The statute covers persons charged with misdemeanors as well as those charged with felonies. The punishment is determined by the underlying charge. If the underlying charge is a misdemeanor, this punishment instruction should be modified to state only the range of punishment for Class 1 misdemeanors. The statute also covers both convicted felons who fail to appear after having been released on bail pending appeal and persons who have plead guilty to a crime and are awaiting sentencing. *Bowling, 51 Va. App. at 108, 654 S.E.2d at 357* (decided under prior version of Va. Code Ann. § 19.2-128, but holding that a person remains "charged" with an offense after conviction, but prior to sentencing).

A jury may infer from circumstantial evidence that a defendant's failure to appear was willful where the defendant gave a false name when arrested, traveled out of state in violation of his bond conditions, was arrested in that state and failed to notify counsel of his incarceration. *Nelson, 50 Va. App. at 419–20, 650 S.E.2d at 565–66*.

A defendant who is summoned to court for multiple offenses and fails to appear can be charged for failure to appear for each of those charges, even though the failure to appear constituted one act by the defendant. In other words, "the unit of prosecution for failure to appear corresponds to the number of individual felony offenses for which a defendant is obligated to appear." *Johnson, 292 Va. at 744, 793 S.E.2d at 324*.

For an in depth discussion of what constitutes "willful failure," see *Chavez, 69 Va. App. at 158–66, 817 S.E.2d at 335–37*.

ALERTS:

• Failure to appear might also be punishable as contempt of court, raising potential double jeopardy problems.

• A defendant can be convicted "of violating Va. Code Ann. § 19.2-128 only if

he 'received timely notice' of when and where he was supposed to appear for court." *Thomas, 48 Va. App. at 609, 633 S.E.2d at 231.* However, timely notice is not an element of the offense. Questions of timely notice are merely subsidiary inquiries that go to proof of the element of willfulness. "Proof of timely notice simply provides a prima facie basis for finding that the element of willful failure to appear has been proven; that is, timely notice is but one mechanism for proving willfulness." *Chavez, 69 Va. App. at 159–60, 817 S.E.2d at 335–6 (2018).*

Va. Code Ann. § 19.2-128 does not apply to revocation proceedings. *Merritt, 69 Va. App. at 457–59, 820 S.E.2d at 381–82.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 26.5

MICHIE'S JURISPRUDENCE, Contempt § 7

Instruction No. 35.700

Obstruction—Resisting Execution of Legal Process

The defendant is charged with the crime of resisting or obstructing execution of legal process. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant resisted or obstructed the execution of legal process, namely** (describe the kind of process resisted or obstructed)**; and**

(2) **That he did so by acting jointly or in combination with another person.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P35.700

Obstruction—Resisting Execution of Legal Process

You have found the defendant guilty of the crime of resisting the execution of legal process.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-409.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: While this offense is codified alongside statutes that involve rioting or unlawful assembly, it is not limited to such situations. Thus, the instruction should be used in any case where the defendant is charged with resisting or obstructing the execution of legal process. See also Instruction No. 35.100 (obstructing justice—law enforcement officer).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.4

MICHIE'S JURISPRUDENCE, Contempt § 2

Instruction No. 35.800

Sex Offender—False Information, Failure to Register, Re-register, or Verify Registration Information—Felony

The defendant is charged with the crime of [failure to register, re-register, or verify registration information with the Sex Offender and Crimes Against Minors Registry; providing false information to the Sex Offender and Crimes Against Minors Registry]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:**

(1) **That the defendant was convicted of** (name of sexually violent crime; murder where the victim is a minor)**; and**

(2) **That the defendant knowingly** [failed to register, re-register, or verify registration information with the Sex Offender and Crimes Against Minors Registry; provided materially false information to the Sex Offender and Crimes Against Minors Registry].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the elements of the crime, then you should find the defendant not guilty.

Instruction No. P35.800

Sex Offender—False Information, Failure to Register, Re-register, or Verify Registration Information—Felony

You have found the defendant guilty of the crime of [failure to register, re-register, or verify registration information with the Sex Offender and Crimes Against Minors Registry; providing false information to the Sex Offender and Crimes Against Minors Registry.]

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 9.1-901–9.1-923 (Sex Offender and Crimes Against Minors Registry Act); Va. Code Ann. § 18.2-472.1(B).

CASE AUTHORITY:

*Turner v. Commonwealth, 297 Va. 257, 260–61,*826 S.E.2d *309–10 (2019); Baugh v. Commonwealth, 68 Va. App. 437, 451, 809 S.E.2d 247, 254 (2018); Shell v. Commonwealth, 64 Va. App. 16, 20–21, 763 S.E.2d 833, 835–36 (2014); Purvy v. Commonwealth, 59 Va. App. 260, 264–69, 717 S.E.2d 847, 849–51 (2011); Marshall v. Commonwealth, 58 Va. App. 210, 215, 708 S.E.2d 253, 255–56 (2011); Johnson v. Commonwealth, 53 Va. App. 608, 615–16, 674 S.E.2d 541, 544 (2009); Harris v. Commonwealth, 53 Va. App. 494, 673 S.E.2d 483 (2009); Morency v. Commonwealth, 274 Va. 569, 573, 649 S.E.2d 682, 683 (2007); McCabe v. Commonwealth, 274 Va. 558, 564–68, 650 S.E.2d 508, 511–14 (2007); Colbert v. Commonwealth, 47 Va. App. 390, 395–403, 624 S.E.2d 108, 111–14 (2006).*

PRACTICE COMMENTARY: Failure to register, re-register, or verify registration information as a sex offender is not a specific-intent crime. Accordingly, a defendant knowingly fails to comply with the statute if he has knowledge of the fact that he has a duty to register, re-register or verify registration information but does not do so. *Marshall, 58 Va. App. at 215, 708 S.E.2d at 255–56.*

An amendment to the Virginia Sex Offender and Crimes Against Minors Registry Act (Va. Code Ann. §§ 9.1-900–9.1-923) that required a convicted sex offender, subject to the requirements of Va. Code Ann. § 18.2-472.1, to re-register with local law enforcement within 30 minutes of acquiring a new email address did not violate the U.S. Constitution's prohibition against *ex post facto* laws, because the General Assembly intended the requirement to be non-punitive in nature, and the resulting civil regulatory scheme was not so punitive in effect as to negate this civil intent. *Baugh v. Commonwealth, 68 Va. App. 437, 451, 809 S.E.2d 247, 254 (2018).*

An amendment to the Sex Offender and Crimes Against Minors Registry Act requiring a person to adhere to more stringent registration requirements does not violate the substantive or procedural due process rights of a convicted sex offender. *McCabe, 274 Va. at 565–68, 650 S.E.2d at 512–13.*

Amendments to the Sex Offender and Crimes Against Minors Registry Act are applied retroactively. *Morency, 274 Va. at 573, 649 S.E.2d at 683.* A convicted sex offender did not obtain a vested or substantive right from a prior court order directing the removal of identifying information from the State Police website. *Id. at 577, 649 S.E.2d at 686.* Retroactive application of an amendment to the Act permitting the reposting of such information did not violate any accrued right of the convicted sex offender. *Id.* Similarly, the subsequent reclassification of defendant's offense from a non-violent to a violent offense, which required him to

register every 90 days for the rest of his life, instead of annually for 10 years, did not violate defendant's procedural due process rights or constitute a "breach of contract" of his plea agreement. *Smith v. Commonwealth, 286 Va. 52, 58–60, 743 S.E.2d 146, 150–51 (2013).*

An affidavit prepared by the Virginia Department of State Police reflecting the records kept by the Department as mandated by statute is not "testimonial" in nature, and introduction of such an affidavit at trial does not violate defendant's right to confrontation under the Sixth Amendment. *Harris v. Commonwealth, 53 Va. App. 494, 500, 673 S.E.2d 483, 486 (2009).*

Va. Code Ann. § 9.1-902 defines the offenses that require registration.

Violation of Va. Code Ann. § 18.2-472.1(A) is a Class 1 misdemeanor for predicate offenses that are not Tier III offenses, or murder. Va. Code Ann. § 9.1-902. The punishment instruction should be modified for predicate offenses that are Tier I and Tier II offenses or that do not involve murder.

A second or subsequent conviction for an offense under Va. Code Ann. § 18.2-472.1(A) (the misdemeanor provision) is a Class 6 felony.

A second or subsequent conviction under Va. Code Ann. § 18.2-472.1(B) (the felony provision) is a Class 5 felony.

An indictment alleging a failure to register re-register, or verify registration information as a sex offender in violation of Va. Code Ann. § 18.2-472.1 is not sufficient to include the offense of knowingly providing materially false information on a registration form in violation of that same statute. *Purvy, 59 Va. App. at 264–69, 717 S.E.2d at 849–51.*

☞ ***PRACTICE POINTER:***

Registration is required even if the actual target of the solicitation was an undercover police officer rather than a child. *Colbert, 47 Va. App. at 400–01, 624 S.E.2d at 113–14.*

A person convicted as a principal in the second degree of a qualifying offense must register under the Act. *Johnson, 53 Va. App. at 615–16, 674 S.E.2d at 544.*

ALERTS:

• Any conviction for a substantially similar offense under the laws of (i) any foreign country or political subdivision or (ii) any state or territory of the United States or any political subdivision, the District of Columbia, or the United States shall be considered a prior conviction. Va. Code Ann. § 18.2-472.1(K). See also *Johnson, 53 Va. App. at 615, 674 S.E.2d at 544* (conviction for second-degree rape under North Carolina law required registration under Va. Code Ann. § 9.1-902); *Turner, 297 Va. at 260–61, 826 S.E.2d at 309-10* (conviction of sexual abuse of a child under Idaho Code § 18-1506 required registration under Va. Code Ann. § 9.1-902(F)(ii) because registration was required in Idaho).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 51.14
MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses § 27

Instruction No. 35.900

Giving False Identity to Law Enforcement Officer

The defendant is charged with the crime of falsely identifying himself to a law enforcement officer. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That a law enforcement officer lawfully detained the defendant; and

(2) That the law enforcement officer requested the defendant to identify himself; and

(3) That the defendant falsely identified himself to the law enforcement officer; and

(4) That the defendant intended to deceive the law enforcement officer as to his real identity.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P35.900

Giving False Identity to Law Enforcement Officer

You have found the defendant guilty of the crime of giving false identity to a law enforcement officer.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment as:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-82.1

CASE AUTHORITY: None

PRACTICE COMMENTARY: None.

***ALERTS*:** None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 27.1, 27.4, 27.7, 27.9

MICHIE'S JURISPRUDENCE, Obstructing Justice § 2

CHAPTER 36

LARCENY AND RELATED OFFENSES (INCLUDING CONCEALMENT OF MERCHANDISE)

Scope Note

Instruction No. 36.100 Grand Larceny—General
Instruction No. P36.100(a) Grand Larceny—General
Instruction No. P36.100(b) Petit Larceny—Misdemeanor
Instruction No. 36.120 Grand Larceny—From Person
Instruction No. P36.120(a) Grand Larceny—From Person—Felony
Instruction No. P36.120(b) Petit Larceny—From Person—Misdemeanor
Instruction No. 36.200 Petit Larceny—General
Instruction No. P36.200 Petit Larceny—General
Instruction No. 36.210 Petit Larceny—Second Offense
Instruction No. P36.210(a) Petit Larceny—Second Offense
Instruction No. P36.210(b) Petit Larceny—First Offense
Instruction No. 36.220 Petit Larceny—Third or Subsequent Offense
Instruction No. P36.220(a) Petit Larceny—Third or Subsequent Offense
Instruction No. P36.220(b) Petit Larceny—Second Offense
Instruction No. P36.220(c) Petit Larceny
Instruction No. 36.300 Larceny—Possession Inference
Instruction No. 36.400 Grand Larceny—Receiving Stolen Goods
Instruction No. P36.400(a) Grand Larceny—Receiving Stolen Goods
Instruction No. P36.400(b) Receiving Stolen Goods—Misdemeanor
Instruction No. 36.410 Receiving Stolen Goods—Possession Inference
Instruction No. 36.420 Receiving Stolen Goods—Supplemental Instructions
Instruction No. 36.500 Unauthorized Use—Felony
Instruction No. P36.500(a) Unauthorized Use—Felony
Instruction No. P36.500(b) Unauthorized Use—Misdemeanor
Instruction No. 36.520 Unauthorized Use—Previous Consent
Instruction No. 36.600 Larceny of Certain Animals

Instruction No. P36.600 Larceny of Certain Animals
Instruction No. 36.800 Grand Larceny—Concealment of Goods or Merchandise
Instruction No. P36.800 Grand Larceny—Concealment of Goods or Merchandise
Instruction No. 36.820 Petit Larceny—Concealment of Goods or Merchandise
Instruction No. P36.820 Petit Larceny—Concealment of Merchandise, etc.
Instruction No. 36.840 Willful Concealment—Prima Facie Evidence
Instruction No. 36.900 Tampering With Metering Device
Instruction No. P36.900 Tampering with Metering Device

SCOPE NOTE

This chapter covers some larceny crimes—Grand and Petit Larceny, Receiving Stolen Property, Unauthorized Use, Larceny of Certain Animals, Concealment, and Tampering With Metering Devices. Instruction No. 36.300 relates to an inference to be drawn from possession of recently stolen property. Instructions for other larceny related crimes can be found in other chapters of this book:

Bad Checks (Chapter 9);

Credit Card Offenses (Chapter 16);

Embezzlement (Chapter 23);

False Pretenses (Chapter 27); and

Welfare Fraud (Chapter 50).

In Virginia, larceny is a common law crime. *Carter v. Commonwealth, 280 Va. 100, 104, 694 S.E.2d 590, 593 (2010).* In addition to the common law elements of the crime, proof of the amount of money or value of goods stolen is required as a statutory element of the offense of grand larceny. Va. Code Ann. §§ 18.2–95, 18.2–96; see *Walls v. Commonwealth, 248 Va. 480, 481, 450 S.E.2d 363, 364 (1994)* (applying the superseded $200 value threshold).

Although the General Assembly has not altered the common law elements of larceny, it has by statute specified its punishment. *Hunt v. Commonwealth, 46 Va. App. 25, 30, 614 S.E.2d 668, 670 (2005).* It has enacted a number of statutes declaring various acts of theft deemed larceny to cover criminal and fraudulent conversions of another's property. *Foster v. Commonwealth, 44 Va. App. 574, 577–78, 606 S.E.2d 518, 519 (2004)*; see also *Anable v. Commonwealth, 65 Va. (24 Gratt) 563, 580–81 (1873)* (Moncure, J., dissenting). Unlike most states, there is no general theft statute in Virginia.

In Va. Code Ann. §§ 18.2–95 and 18.2–96, the legislature designated simple larceny of goods and chattels of the "value of $1,000 or more" as grand larceny and thefts of property valued under $1,000 as petit larceny. The Virginia General Assembly amended the larceny statutes to increase the previous "$500 or more" threshold for grand larceny to the current "$1000 or more," threshold effective July 1, 2020. Va. Code Ann. §§ 18.2-95, 18.2-96.

Regardless of its value, if the item stolen is a firearm, however, the crime is grand larceny. Va. Code Ann. § 18.2-95(iii). Larceny "from the person of another of money or other thing of value of $5 or more" is grand larceny. Va. Code Ann. § 18.2-95(i). Larceny "from the person of another of money or other thing of value of less than $5" is petit larceny. Va. Code Ann. § 18.2-96. Larceny "from the person" includes not only property in physical contact with the victim, but also property in his possession and immediate custody and control. *Garland v. Commonwealth, 18 Va. App. 706, 710, 446 S.E.2d 628, 630 (1994)*; *Saunders v. Commonwealth, 18 Va. App. 825, 829, 447 S.E.2d 526, 528–29 (1994).*

For a discussion concerning proof of the value of stolen property, see the Practice Commentary for Instruction No. P36.100b.

Common law larceny is distinguished from common law robbery by the element of force or intimidation which is an element of robbery but not of larceny. "Larceny by receiving stolen goods is a lesser offense which is included in the major one of larceny." *Cabbler v. Commonwealth, 212 Va. 520, 524, 184 S.E.2d 781, 783 (1971).* Larceny from the person,

however, is not a lesser offense of robbery. *Ali v. Commonwealth, 280 Va. 665, 669, 701 S.E.2d 64, 67 (2010).*

The crime of embezzlement, although similar, is distinct from larceny. Embezzlement differs from larceny in that it is the wrongful appropriation or conversion of property where the original possession was lawful or with the consent of the owner. Larceny involves trespass and the felonious intent must exist at the time of the taking. *Gwaltney v. Commonwealth, 19 Va. App. 468, 474–75, 452 S.E.2d 687, 699–91 (1995).*

Under Va. Code Ann. § 18.2-111, proof of embezzlement is sufficient to sustain a charge of larceny. See Comment to Instruction P23.100(a) and (b).

For computer-related statutes see Va. Code Ann. § 18.2-152.6, prohibiting the theft of computer services, and Va. Code Ann. § 18.2-152.3, prohibiting computer fraud.

Instruction No. 36.100 deals with Va. Code Ann. § 18.2-95(ii) and Va. Code Ann. § 18.2-95(iii). Instruction No. 36.120 deals with Va. Code Ann. § 18.2-95(i). Instruction No. 36.120 is applicable where grand larceny is committed from the person of another, while Instruction No. 36.100 is applicable where "simple" grand larceny is committed, that is, where the theft is not from the person of the victim.

Instruction No. 36.200 relates to Va. Code Ann. § 18.2-96, covering petit larceny. It is applicable where the value of the goods stolen is below the appropriate statutory minimum necessary to constitute grand larceny as set forth in Va. Code Ann. § 18.2-95(i) and (ii). Va. Code Ann. § 18.2-104 contains punishment provisions for conviction of second and subsequent larceny offenses. A broad scope of prior convictions can be used as a basis for enhancement of punishment as a repeat offender. *Pitts v. Commonwealth, 58 Va. App. 741, 743–44, 716 S.E.2d 137, 138 (2011).* See Instruction Nos. 36.210 (second offense) and 36.220 (third or subsequent offense), each containing the additional element that the Commonwealth must prove and the applicable provisions regarding punishment. Where prior offenses are proved under a repeat offender statute, cautionary instructions as to the purpose of the proof of prior offenses should be given. *Brown v. Commonwealth, 226 Va. 56, 59, 307 S.E.2d 239, 240–41 (1983).*

Instruction No. 36.300 concerns permissible inferences to be drawn from the possession of recently stolen goods. This instruction is suitable to all cases arising under Va. Code Ann. §§ 18.2-95–18.2-110.

Instruction Nos. 36.400 and 36.420 concern knowing receipt of stolen goods as proscribed in Va. Code Ann. § 18.2-108. Insofar as it provides that one who knowingly receives stolen goods is guilty of larceny, Va. Code Ann. § 18.2-108 must be read in conjunction with the general grand and petit larceny statutes, Va. Code Ann. §§ 18.2-95 and 18.2-96.

Instruction Nos. 36.500 and 36.520 cover Va. Code Ann. § 18.2-102, prohibiting unauthorized use of an animal, aircraft, vehicle, or boat. The intent element alone distinguishes unauthorized use from larceny as defined by Va. Code Ann. § 18.2-95. While larceny requires an intent to deprive another permanently of his property, unauthorized use as defined in Va. Code Ann. § 18.2-102 encompasses the taking of another's property with intent to keep it only temporarily. *Overstreet v. Commonwealth, 17 Va. App. 234, 236, 435 S.E.2d 906, 907–08 (1993).* Exceeding the owner's limitation on the use of a vehicle was held unauthorized use in *Tucker v. Commonwealth, 268 Va. 490, 494, 604 S.E.2d 66, 68 (2004); Overstreet, 17 Va. App. at 236–38, 435 S.E.2d at 908–09.*

Instruction No. 36.600 covers the larceny of specific animals and poultry as catalogued in Va. Code Ann. § 18.2-97.

Instruction Nos. 36.800–36.840 deal with the crime of larceny by concealment of goods or merchandise. These instructions, derived from Va. Code Ann. § 18.2-103, deal separately with concealment of goods valued at $1000 or more, which constitutes grand larceny (Instruction No. 36.800) and concealment of goods valued at less than $1000, which constitutes petit larceny (Instruction No. 36.820).

Instruction No. 36.840 covers concealment of goods or merchandise while on the premises of a store, which constitutes prima facie evidence of intent to convert and defraud the owner out of the value of the goods or merchandise under Va. Code Ann. § 18.2-103.

Instruction No. 36.900, based on Va. Code Ann. § 18.2-163, covers the crime of tampering with a metering device.

There are no instructions covering other larceny related crimes—fraudulent sale, pledge, removal of personal property by person in possession subject to a lien (Va. Code Ann. § 18.2-115); failure to pay for or return goods delivered for selection or approval (Va. Code Ann. § 18.2-116); failure of bailee to return animal, aircraft, vehicle or boat (Va. Code Ann. § 18.2-117); failure to return leased or rental personal property (Va. Code Ann. § 18.2-118).

Instruction No. 36.100

Grand Larceny—General

The defendant is charged with the crime of grand larceny. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant took** (describe personal property) **belonging to** (name of person) **and carried it away; and**

(2) **That the taking was against the will and without the consent of the owner; and**

(3) **That the taking was with the intent to steal; and**

(4) **That the property taken** [was worth $1000 or more; was a firearm].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of grand larceny [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has not proved beyond a reasonable doubt that the property carried away was $1000 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of minimum or specific value), then you shall find the defendant guilty of petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the first three elements of the crime or failed to prove the property carried away was of some value, then you shall find the defendant not guilty.

Instruction No. P36.100(a)

Grand Larceny—General

You have found the defendant guilty of the crime of grand larceny.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P36.100(b)

Petit Larceny—Misdemeanor

You have found the defendant guilty of the crime of petit larceny.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-11, 18.2-95, 18.2-96, 19.2-289.

CASE AUTHORITY:

Commonwealth v. Moseley, 293 Va. 455, 463–66, 799 S.E.2d 683, 686–687 (2017); *Frango v. Commonwealth, 66 Va. App. 34, 41–43, 782 S.E.2d 175, 178–179 (2016)*; *Creamer v. Commonwealth, 64 Va. App. 185, 205, 767 S.E.2d 226, 235 (2015)*; *Little v. Commonwealth, 59 Va. App. 725, 730–33, 722 S.E.2d 317, 319–20 (2012)*; *Walker v. Commonwealth, 281 Va. 227, 230, 704 S.E.2d 124, 126 (2011)*; *Carter v. Commonwealth, 280 Va. 100, 104–07, 694 S.E.2d 590, 593–95 (2010)*; *Baylor v. Commonwealth, 55 Va. App. 82, 87–88, 683 S.E.2d 843, 845–46 (2009)*; *Britt v. Commonwealth, 276 Va. 569, 574, 667 S.E.2d 763, 765 (2008)*; *McAlevy v. Commonwealth, 270 Va. 378, 379–80, 620 S.E.2d 758, 759 (2005)*; *Acey v. Commonwealth, 29 Va. App. 240, 246–49, 511 S.E.2d 429, 431–33 (1999)*; *Robinson v. Commonwealth, 258 Va. 3, 5–6, 516 S.E.2d 475, 476 (1999)*; *Parker v. Commonwealth, 254 Va. 118, 120–21, 489 S.E.2d 482, 483 (1997)*; *Richardson v. Commonwealth, 25 Va. App. 491, 495–98, 489 S.E.2d 697, 699–701 (1997)* (en banc); *Cabbler v. Commonwealth, 212 Va. 520, 523–24, 184 S.E.2d 781, 783–84 (1971)*; *Robinson v. Commonwealth, 190 Va. 134, 138–44, 56 S.E.2d 367, 369–72 (1949)*.

PRACTICE COMMENTARY:

Asportation required. "The slightest asportation is sufficient, even though the property may be abandoned immediately." *Welch v. Commonwealth, 15 Va. App. 518, 522–24, 425 S.E.2d 101, 104–05 (1992)*.

The asportation element is satisfied when a defendant uses an innocent purchaser of property to take and carry away property not belonging to the defendant. *McAlevy, 270 Va. at 380, 620 S.E.2d at 759*.

Computer related thefts. See Va. Code Ann. § 18.2-152.6 prohibiting the theft of computer services and Va. Code Ann. § 18.2-152.3 prohibiting computer fraud. See also *Evans, 226 Va. 292, 295, 308 S.E.2d 126, 127–28* (discussing the theft of computer printout of a customer security list). In addition, Va. Code Ann. § 18.2-152.8 provides that, for purposes of Va. Code Ann. §§ 18.2-95, 18.2-96, 18.2-108 and 18.2-111, personal property subject to embezzlement, larceny, or receiving stolen goods includes computer and computer networks, financial instruments, computer data, computer programs, computer software, and computer services. See Chapter 13, Computer Crimes.

Intent. To constitute larceny, the perpetrator must have the intent to permanently deprive the owner of her property. *Creamer, 64 Va. App. at 205, 767 S.E.2d at 235*. The Court's decision in *Robinson* indicates that in distinguishing between ordinary larceny and unauthorized use, intent may be inferred from facts and circumstances surrounding the taking and establishes that intent to use and abandon satisfies the intent to steal element of larceny. *190 Va. at 143, 56 S.E.2d at 372*; see also

Creamer, 64 Va. App. at 205–06, 767 S.E.2d at 235–36; *Skeeter v. Commonwealth, 217 Va. 722, 725–26, 232 S.E.2d 756, 758–59 (1977).*

Single Larceny doctrine. A series of larcenous acts will be considered a single count of larceny if they "are done pursuant to a single impulse and in execution of a general fraudulent scheme." *West v. Commonwealth, 125 Va. 747, 754, 99 S.E. 654, 656 (1919).* A court will consider the following factors when deciding whether the single larceny doctrine applies: (1) the location of the items taken, (2) the lapse of time between the takings, (3) the general and specific intent of the taker, (4) the number of owners of the items taken and (5) whether intervening events occurred between the takings. See *Richardson, 25 Va. App. at 497, 489 S.E.2d at 700*: "The primary factor to be considered is the intent of the thief . . . ." *Id.* For example, theft of two purses from a hospital nurses' station was a single larceny even though the purses were separated by approximately ten feet and a wall. *Richardson, 25 Va. App. at 497–99, 489 S.E.2d at 700–01* (stating the controlling factor is acting under the same impulse to steal at the time of both thefts); *Acey, 29 Va. App. at 247–48, 511 S.E.2d at 432* (finding the theft of three firearms constituted single larceny; decided under Va. Code Ann. § 18.2-108.1).

For a discussion of a "conditional" intent to return unlawfully taken property see *Marsh v. Commonwealth, 57 Va. App. 645, 651–52, 704 S.E.2d 624, 627 (2011)* (discussing property used as collateral for a loan at a pawn shop).

Establishing value. Va. Code Ann. § 18.2-95(ii) provides the statutory amount for a conviction of grand larceny, and Va. Code Ann. § 19.2-289 provides for conviction of petit larceny when, on an indictment for grand larceny, the Commonwealth proves the common law elements but not the statutory amount. While the subject of petit larceny must be an object of some value, no proof need be adduced of a specific value. *Evans, 226 Va. at 297, 308 S.E.2d at 129.*

In a grand larceny prosecution, the burden is upon the Commonwealth to prove beyond a reasonable doubt that the value of the goods stolen equals at least the amount fixed by statute in definition of the offense. *Frango, 66 Va. App. at 42, 782 S.E.2d at 178–79; Walker, 281 Va. at 230, 704 S.E.2d at 126; Dunn v. Commonwealth, 222 Va. 704, 705, 284 S.E.2d 792, 792 (1981).* The Commonwealth need not prove the exact value of stolen property, but only that its value exceeded the statutory minimum. *Walker, 281 Va. at 230, 704 S.E.2d at 126*; *Jefferson v. Commonwealth, 298 Va. 1, 12, 833 S.E.2d 462, 468 (2019).* While the original purchase price of an item may be admitted as evidence of its current value, there must also be due allowance for elements of depreciation. *Gertler v. Bowling, 202 Va. 213, 215, 116 S.E.2d 268, 270 (1960).* Without a showing of the effect of age and wear and tear on the value of an item, the jury might be misled to believe that original price equals current value.

See also the discussion of related points in the *Robinson, 190 Va. at 143, 56 S.E.2d at 372–73* and *Lester v. Commonwealth, 30 Va. App. 495, 503–06, 518 S.E.2d 318, 322–23 (1999)* decisions.

The value of an object of larceny is determined by its market value, and

particularly retail value. See *DiMaio v. Commonwealth, 272 Va. 504, 509, 636 S.E.2d 456, 460 (2006)*; *Twine v. Commonwealth, 48 Va. App. 224, 230, 629 S.E.2d 714, 717 (2006)*; *Robinson v. Commonwealth, 258 Va. at 5, 516 S.E.2d at 476.* Mere evidence of replacement value alone is insufficient as a matter of law to support an inference that the fair market value of stolen property necessarily exceeds the statutory threshold for grand larceny. *Baylor, 55 Va. App. at 87–88, 683 S.E.2d at 845.* Nevertheless, in some situations, replacement value can establish actual value. *Spratley v. Commonwealth, 69 Va. App. 314, 318, 818 S.E.2d 823, 825 (2018)* ("Although replacement value may be considered in establishing actual value, it is not a substitute for market value."); *Little, 59 Va. App. at 731–33, 722 S.E.2d at 320–21*; see also *Baylor, 55 Va. App. at 89–90, 683 S.E.2d at 846* ("To be clear, we expressly do not hold that evidence of an item's replacement cost may never be used to assist in establishing a stolen item's value."). While the subject of petit larceny must be an object of some value, no proof need be adduced of a specific value. *Evans v. Commonwealth, 226 Va. at 297, 308 S.E.2d at 129 (1983).*

When there is no market value for a stolen item, the prosecution must present evidence of actual value. *Baylor, 55 Va. App. at 88, 683 S.E.2d at 845* (reversing grand larceny conviction for failure to prove value, when there was no market value for used catalytic converters and the prosecution introduced no evidence to prove the scrap value of the stolen converters). When market value cannot be shown, in certain circumstances replacement value can be considered in establishing actual value. *Little, 59 Va. App. at 731–33, 722 S.E.2d at 320–21.*

Value of stolen property is measured as of the time of theft. *Spratley v. Commonwealth, 69 Va. at 318, 818 S.E.2d at 825*; *Parker v. Commonwealth, 254 Va. 118, 121, 489 S.E.2d 482, 483 (1997).*

Opinion testimony as to value may be given by the owner or a nonexpert possessing sufficient knowledge of value or ample opportunity for forming a correct opinion. *Walls v. Commonwealth, 248 Va. 480, 482–83, 450 S.E.2d 363, 364–65 (1994).*

Opinion testimony of a nonexpert, who is not the owner of the personal property in question, is also admissible upon the subject of property value, provided the witness possesses sufficient knowledge of the value of the property or has had ample opportunity for forming a correct opinion as to value. *Burton v. Commonwealth, 58 Va. App. 274, 280–81, 708 S.E.2d 444, 447 (2011)*; *Walls, 248 Va. at 483, 450 S.E.2d at 365.*

In automobile larceny cases, the National Automobile Dealers' Association (NADA) publication is admissible in evidence as to fair market value. Va. Code Ann. § 8.01-419.1; *Walker, 281 Va. at 230–31, 704 S.E.2d at 126–27* (stating the NADA "blue book" is not testimonial in nature).

In *Robinson, 258 Va. at 10, 516 S.E.2d at 478–79*, the Supreme Court of Virginia recognized an exception to the hearsay rule in shoplifting cases permitting the admission into evidence of price tags regularly affixed to items of personalty offered for sale as prima facie evidence of the item's value.

The value of goods may be proved under the modern Shopbook Rule by admission into evidence of a regularly prepared inventory taken by employees or by an outside contractor. *McDowell v. Commonwealth, 273 Va. 431, 434, 641 S.E.2d 507, 509 (2007).*

With respect to larceny of a credit card, neither the value of goods purchased using the card nor the line of credit available through the card is evidence of the value of the credit card. *Owolabi v. Commonwealth, 16 Va. App. 78, 80–81, 428 S.E.2d 14, 15–16 (1993).* See Credit Card Offenses, Ch.16.

In a prosecution under Va. Code Ann. § 18.2-95 for larceny on a winning lottery ticket, the evidence failed to prove that the value of the paper ticket was $200 or more. The extended definition of larceny covering bank notes, checks and papers of value in Va. Code Ann. § 18.2-98 did not apply because the defendant was never charged with that offense. *Hunt v. Commonwealth, 46 Va. App. 25, 31–32, 35, 614 S.E.2d 668, 670–72 (2005).*

Where the defendant was charged with stealing a cordless telephone valued at $240, but only took the handset, and there was no evidence that the handset was worth more than $200, he was not guilty of grand larceny. The value of a stolen component of a unit is not the same value as the entire unit where the unit is rendered inoperable by theft. *Parker, 254 Va. at 121, 489 S.E.2d at 483–84.*

Proof of Some Value or Utility. At common law, to be the subject of larceny, an article must be of some non-zero value. It is sufficient "if it be worth less than the smallest coin known to the law." *Frango, 66 Va. App. at 45, 782 S.E.2d at 180*; *Wolverton v. Commonwealth, 75 Va. 909, 913 (1881).* A conviction for petit larceny was thus upheld where the indictment charged the defendant with larceny of a padlock, with the key in it, that was worth thirty cents. *Id. at 913.* Similarly, a conviction for robbery based on the taking of a vehicle's ignition key, valued at thirty-five cents in the indictment, was upheld. *Pierce v. Commonwealth, 205 Va. 528, 532, 138 S.E.2d 28, 31 (1964).*

The Supreme Court of Virginia has also specifically held that "[u]nder settled Virginia law, no proof need be adduced to show that the subject of petit larceny has a specific value." *Evans v. Commonwealth, 226 Va. at 297, 308 S.E.2d at 129 (1983)*; see also *Wright v. Commonwealth, 196 Va. 132, 139, 82 S.E.2d 603, 607 (1954).* Proof that an article or item has utility can satisfy the requirement that the article or item have a non-zero value. *Compare, Evans, 226 Va. at 297, 308 S.E.2d at 129* (testimony that a security customer list taken by former bank employees and given to their new employer, who was a competitor, "was an invaluable sales tool" and that it would give a competitor a valuable "edge" if the list fell into the competitor's hands, along with evidence of the "nature and use" of the list itself, supplied proof that the list had value), with *Wolverton, 75 Va. at 913* (proof that a padlock had the key in it when it was taken, coupled with proof that it had been used for fastening the door on which it was hanging, was sufficient proof of its value), and *Pierce, 205 Va. at 532, 138 S.E.2d at 31* (description of the key in the

indictment as an ignition key valued at thirty-five cents was "sufficient to show that it was of some value").

Timber Theft. Va. Code Ann. § 55.1-2839 recognizes theft of timber to include the act of failing to remit payment from a buyer of timber to owner of the land on which the timber was grown. If the buyer does not remit payment by the date specified in a written timber sales agreement, or if there is no agreement, within 60 days from the date of removal of timber from the land, the buyer shall be guilty of timber theft, which is punishable as a Class 1 misdemeanor. A person guilty of this offense shall be ordered to pay restitution equal to three times the value of the timber, in addition to any penalties imposed by the court.

☞ ***PRACTICE POINTER:***

Bailments. The taking of property in the hands of a bailee may be larceny against the bailor or the bailee. *Catterton v. Commonwealth, 23 Va. App. 407, 410–11, 477 S.E.2d 748, 750 (1996).* Va. Code Ann. § 18.2-117 creates a statutory offense whereby the bailee will be deemed guilty of larceny for failing to return the property of the bailor. Under the statute, proof of intent to permanently deprive the owner of possession is not required. *Reed v. Commonwealth, 62 Va. App. 270, 278–79, 746 S.E.2d 81, 84–85 (2013).*

⓿ ***ALERTS:***

• The value of property taken must be $1000 or more to constitute grand larceny under Va. Code Ann. § 18.2-95.

• A defendant need not remove merchandise from the store so long as he has engaged in conduct which makes his possession clearly adverse to the store. *Carter, 280 Va. at 106, 694 S.E.2d at 594.*

• Receiving stolen goods is a species of larceny. *Covil v. Commonwealth, 268 Va. 692, 694, 604 S.E.2d 79, 81 (2004)*; *Cabbler, 212 Va. at 524, 184 S.E.2d at 783* (stating that receiving stolen goods "is a lesser offense which is included in the major one of larceny."). See Instruction No. 36.400.

• Value is not an element when the stolen item is a firearm. Va. Code Ann. §§ 18.2-95(iii), 18.2-108.1.

• Convictions for both grand larceny (Va. Code Ann. § 18.2-95) and grand larceny with intent to sell or distribute (Va. Code Ann. § 18.2-108.01) do not violate principles of Double Jeopardy. Va. Code Ann. § 18.2-108.01 provides that a conviction for violating the statute "constitutes a separate and distinct offense." Thus, the legislature has authorized multiple punishments for a violation of the statute and other larceny statutes. *Tharrington v. Commonwealth, 58 Va. App. 704, 710–11, 715 S.E.2d 388, 391 (2011).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Carig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.120

Grand Larceny—From Person

The defendant is charged with the crime of grand larceny. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant took** (describe personal property) **from the person of** (name of person) **and carried it away; and**

(2) **That the taking was against the will and without the consent of the other person; and**

(3) **That the taking was with the intent to steal; and**

(4) **That the property was worth $5 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of grand larceny from the person, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has not proved beyond a reasonable doubt that the property carried away was $5 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of minimum or specific value), then you shall find the defendant guilty of petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the first three elements of the crime or failed to prove the property carried away was of some value, then you shall find the defendant not guilty.

Instruction No. P36.120(a)

Grand Larceny—From Person—Felony

You have found the defendant guilty of the crime of grand larceny.

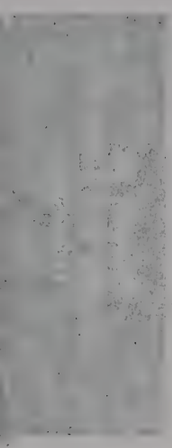
Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.



Instruction No. P36.120(b)

Petit Larceny—From Person—Misdemeanor

You have found the defendant guilty of the crime of petit larceny.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-11, 18.2-95, 18.2-96.

CASE AUTHORITY:

Commonwealth v. Hudgins, 269 Va. 602, 606, 611 S.E.2d 362, 365 (2005). See the Sources & Authority statement accompanying Instruction No. 36.100.

PRACTICE COMMENTARY: Larceny from the person includes not only property in physical contact with the victim, but also property in his possession and immediate custody and control. *Garland v. Commonwealth, 18 Va. App. 706, 710, 446 S.E.2d 628, 630 (1994)*; *Saunders v. Commonwealth, 18 Va. App. 825, 829, 447 S.E.2d 526, 528–29 (1994).*

Where the defendant grabbed the victim, jerked her around, and grabbed the purse she was clutching, the offense was robbery because the property was taken by force. *Jones v. Commonwealth, 26 Va. App. 736, 738–39, 496 S.E.2d 668, 669–70 (1998).* Although the defendant was guilty of robbery, he should not also have been convicted of larceny where he reached into the cash register, struggled with the store clerk over the cash, and then fled with the money because the court concluded that all of the property was taken by force. *Ali v. Commonwealth, 280 Va. 665, 668–69, 701 S.E.2d 64, 66–67 (2010).*

Grand larceny from the person is not a lesser-included offense of robbery. *Hudgins, 269 Va. at 606–08, 611 S.E.2d at 365–66.*

ALERTS:

- Petit larceny is a Class 1 misdemeanor. Va. Code Ann. § 18.2-96.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.200

Petit Larceny—General

The defendant is charged with the crime of petit larceny. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant took** (describe personal property) **belonging to** (name of person) **and carried it away; and**

(2) **That the taking was against the will and without the consent of the owner; and**

(3) **That the taking was with the intent to steal; and**

(4) **That the property was of some value.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.200

Petit Larceny—General

You have found the defendant guilty of the crime of petit larceny.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-11, 18.2-96, 18.2-103.

CASE AUTHORITY:

Charles v. Commonwealth, 63 Va. App. 289, 296–97, 756 S.E.2d 917, 921 (2014); *Foster v. Commonwealth, 44 Va. App. 574, 577–78, 606 S.E.2d 518, 519–20 (2004), aff'd, 271 Va. 235, 238, 623 S.E.2d 902, 903–04 (2006).*

PRACTICE COMMENTARY: This instruction may be used whether the petit larceny is from the person of a victim or not. While the subject of petit larceny must be an object of some value, no proof need be adduced of a specific value. *Evans, 226 Va. 292, 297, 308 S.E.2d 126, 129.*

For additional discussion of principles pertinent to petit larceny, see the Practice Commentary for Instruction No. 36.100.

☞ ***PRACTICE POINTER:***

Other statutes may apply to specific actions. See Va. Code Ann. § 18.2-152.6, prohibiting the theft of computer services and Va. Code Ann. § 18.2-152.3, prohibiting computer fraud.

ALERTS:

• Va. Code Ann. § 18.2-104 specifically deals with repeat larceny offenders. In such cases, use Instruction No. 36.210 or 36.220, as appropriate. As to limiting instructions regarding proof of prior offenses, see *Brown v. Commonwealth, 226 Va. 56, 58–59, 307 S.E.2d 239, 240 (1983).*

• If the property taken was a firearm (regardless of value), the crime is grand larceny. See Va. Code Ann. § 18.2-95(iii).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.210

Petit Larceny—Second Offense

The defendant is charged with the crime of petit larceny second offense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant took** (describe personal property) **belonging to** (name of person) **and carried it away; and**

(2) **That the taking was against the will and without the consent of the owner; and**

(3) **That the taking was with the intent to steal; and**

(4) **That the property was of some value; and**

(5) **That the defendant has a prior larceny conviction.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of petit larceny second offense, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements but has failed to prove the fifth element of the crime as charged, then you shall find the defendant guilty of petit larceny first offense, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one of the first four elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.210(a)

Petit Larceny—Second Offense

You have found the defendant guilty of the crime of petit larceny second offense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at confinement in jail for a specific term not less than thirty (30) days nor more than twelve (12) months.

Instruction No. P36.210(b)

Petit Larceny—First Offense

You have found the defendant guilty of the crime of petit larceny first offense.

Upon the consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-11, 18.2-96, 18.2-104.

CASE AUTHORITY:

Pitts v. Commonwealth, 66 Va. App. 696, 699–701, 791 S.E.2d 741, 742–43 (2016).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-104 "provides that upon proof of a prior 'conviction,' not a prior 'offense,' a defendant may be subject to the enhanced penalty." *Pitts, 66 Va. App. at 700, 791 S.E.2d at 743.*

According to *Scott v. Commonwealth, 217 Va. 425, 427–28, 230 S.E.2d 236, 237–38 (1976)*, increased punishment is appropriate whether the prior conviction resulted from charges under a comparable local ordinance prohibiting shoplifting or under the state statute. Under Va. Code Ann. § 18.2-104, conviction "in another jurisdiction for any offense of larceny or any offense deemed or punishable as larceny, or of any substantially similar offense in any other jurisdiction" is applicable for triggering increased punishment. Robbery is not a predicate offense. *Harris v. Commonwealth, 23 Va. App. 311, 313–15, 477 S.E.2d 3, 4–5 (1996), aff'd, 24 Va. App. 613, 484 S.E.2d 170 (1997)* (*en banc*).

ALERTS:

• Juvenile adjudications may not be used to enhance a sentence under Va. Code Ann. § 18.2-104. *Conkling v. Commonwealth, 45 Va. App. 518, 523–25, 612 S.E.2d 235, 238–39 (2005).*

• Where prior offenses are proved under a repeat offender statute, cautionary instructions as to the purpose of the proof of prior offenses should be given as in *Brown v. Commonwealth, 226 Va. 56, 59, 307 S.E.2d 239, 240 (1983).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Carig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.220

Petit Larceny—Third or Subsequent Offense

The defendant is charged with the crime of petit larceny third or subsequent offense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant took (describe personal property) **belonging to** (name of person) **and carried it away; and**

(2) That the taking was against the will and without the consent of the owner; and

(3) That the taking was with the intent to steal; and

(4) That the property was of some value; and

(5) That the defendant has at least two (2) prior larceny convictions.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but not fix the punishment until further evidence is heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements of the crime as charged but has proved only one prior conviction, then you shall find the defendant guilty of the crime of petit larceny second offense, [but you shall not fix punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements but has failed to prove any prior convictions, then you shall find the defendant guilty of the crime of petit larceny first offense, [but you shall not fix punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one of the first four elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.220(a)

Petit Larceny—Third or Subsequent Offense

You have found the defendant guilty of the crime of petit larceny third or subsequent offense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

You have found the defendant guilty of the crime of petit larceny third or subsequent offense.

Upon consideration thereof the court has been duly advised in the premises.

It is therefore the judgment and sentence of the court that the defendant

(1) Be confined in jail for a specific time, but not more than five (5) years; or

(2) Be confined in jail for a specific time, but not more than twelve (12) months; or

(3) Be fined a specific amount, but not more than $2,500; or

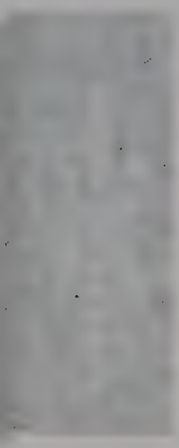
(4) Be confined in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P36.220(b)

Petit Larceny—Second Offense

You have found the defendant guilty of the crime of petit larceny second offense.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at confinement in jail for a specific term not less than thirty (30) days nor more than twelve (12) months.



Instruction No. P36.220(c)

Petit Larceny

You have found the defendant guilty of the crime of petit larceny. Upon consideration of all the evidence you have heard, you shall fix the punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-11, 18.2-96, 18.2-104.

CASE AUTHORITY:

Pitts v. Commonwealth, 66 Va. App. 696, 699–701, 791 S.E.2d 741, 742–43 (2016); *Charles v. Commonwealth, 63 Va. App. 289, 296–97, 756 S.E.2d 917, 921 (2014)*; *Pitts v. Commonwealth, 58 Va. App. 741, 742–44, 716 S.E.2d 137, 138 (2011).*

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-104 is a recidivist statute that enhances the sentence of a person convicted of a third larceny-type offense by converting a petit larceny offense from a misdemeanor to a Class 6 felony. *Pitts, 66 Va. App. at 699, 791 S.E.2d at 742*; see also *Harris v. Commonwealth, 23 Va. App. 311, 313, 477 S.E.2d 3,4 (1996), aff'd, 24 Va. App. 613, 484 S.E.2d 170 (1997).*

Juvenile adjudications may not be used to enhance a sentence under Va. Code Ann. § 18.2-104. *Conkling v. Commonwealth, 45 Va. App. 518, 523–25, 612 S.E.2d 235, 238–39 (2005).* Conviction of a third or subsequent offense is a Class 6 felony. Predicate offenses include any larceny offense, any offense deemed larceny, any offense punishable as larceny and any substantially similar offense in any other jurisdiction. Va. Code Ann. § 18.2-104; *Pitts, 58 Va. App. at 743–44, 716 S.E.2d at 138.*

Va. Code Ann. § 18.2-104 "provides that upon proof of a prior 'conviction,' not a prior 'offense,' a defendant may be subject to the enhanced penalty." *Pitts, 66 Va. App. at 700, 791 S.E.2d at 743.*

Increased punishment is appropriate whether the prior conviction resulted from charges under a comparable local ordinance prohibiting shoplifting or under the state statute. *Scott v. Commonwealth, 217 Va. 425, 427–28, 230 S.E.2d 236, 237–38 (1976).*

Robbery is not a predicate offense. *Harris, 23 Va. App. at 313–15, 477 S.E.2d at 4–5.*

PRACTICE POINTER:

For a Class 6 punishment instruction, see Instruction No. 54.600.

ALERTS:

•Where prior offenses are proved under a repeat offender statute, cautionary instructions as to the purpose of the proof of prior offenses should be given as in *Brown v. Commonwealth, 226 Va. 56, 59, 307 S.E.2d 239, 240 (1983).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Carig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.300

Larceny—Possession Inference

If you believe from the evidence that (describe personal property) **belonging to** (name of person) **was taken and carried away, that the taking was against the will and without the consent of the owner, and that the taking was with the intent to steal, then proof of the exclusive possession by the defendant of the recently stolen** (describe property) **is a circumstance from which you may reasonably infer that the defendant was the thief, unless, from all the evidence, you have a reasonable doubt as to whether the defendant was the thief.**

You may not find from the possession of recently stolen goods alone that the defendant is guilty of larceny.

The term "recently" is a relative term. Drawing an inference of guilt from unexplained possession becomes less reasonable as more time elapses from the time of theft.

"Exclusive possession" must be actual knowing possession.

["Exclusive possession" may be joint with another or others but it must be under circumstances which cause you to believe that the defendant has knowing joint possession. It is not shown when the property is found on premises owned or occupied by others as well as the defendant, or in a place where others had equal opportunity or right of access, unless there is a further showing of actual knowing possession.]

Note:

If there is no evidence of joint possession the fourth paragraph should not be given.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Dobson v. Commonwealth, 260 Va. 71, 74–76, 531 S.E.2d 569, 571–72 (2000); *Winston v. Commonwealth, 26 Va. App. 746, 757–58, 497 S.E.2d 141, 147 (1998)*; *Archer v. Commonwealth, 26 Va. App. 1, 12–13, 492 S.E.2d 826, 832 (1997)*; *Bynum v. Commonwealth, 23 Va. App. 412, 419–20, 477 S.E.2d 750, 754 (1996)*; *Best v. Commonwealth, 222 Va. 387, 389, 282 S.E.2d 16, 17 (1981)*; *Montgomery v. Commonwealth, 221 Va. 188, 190, 269 S.E.2d 352, 353 (1980)*; *Castle v. Commonwealth, 196 Va. 222, 226–29, 83 S.E.2d 360, 363–64 (1954)*; *Tyler v. Commonwealth, 120 Va. 868, 870–71, 91 S.E. 171, 172 (1917)*; *Price v. Commonwealth, 62 Va. (21 Gratt.) 846, 864–66 (1872).*

PRACTICE COMMENTARY: The rule laid down in *Price* is that if recently stolen property is found in the exclusive possession of the defendant, such possession in itself affords sufficient ground for a presumption of fact that he was the thief. *62 Va. (21 Gratt) at 868–69.* See also the decision by the Court in *Best,* in which the Court continues to refer to the larceny "presumption" arising from exclusive possession of recently stolen property. *222 Va. at 389, 282 S.E.2d at 17.* But see *Stokes v. Warden, 226 Va. 111, 117, 306 S.E.2d 882, 885 (1983),* and *Sandstrom v. Montana, 442 U.S. 510, 522–24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979),* on the constitutionality of presumptions.

What constitutes "possession."

Under the decisions in *Archer, Best, and Castle,* when stolen goods are found upon premises occupied by the defendant jointly with others, or in a place to which others had equal access, the Commonwealth must prove that the defendant consciously asserted at least a possessory interest in, or exercised dominion over, the stolen property. *26 Va. App. at 13, 492 S.E.2d at 832*; *222 Va. at 389, 282 S.E.2d at 17*; *196 Va. at 227, 83 S.E.2d at 363–64.*

To justify the inference of joint possession there must be evidence of joint control. *Reese v. Commonwealth, 230 Va. 172, 175, 335 S.E.2d 266, 267 (1985).* See also *Williams v. Commonwealth, 56 Va. App. 638, 643–44, 696 S.E.2d 233, 236 (2010)* (passenger of stolen vehicle may, under certain circumstances, be found to have joint exclusive possession of the vehicle). Riding in a stolen vehicle as passenger, without more, is insufficient possession. *Moehring v. Commonwealth, 223 Va. 564, 568, 290 S.E.2d 891, 893 (1982).*

What constitutes "recent" possession.

As to whether possession is "recent," three months has been held to be not too remote. *Wilborne v. Commonwealth, 182 Va. 63, 69, 28 S.E.2d 1, 4 (1943).* And four weeks was held to be "recent." *Montgomery, 221 Va. at 190, 269 S.E.2d at 353.*

Constitutional considerations.

In *Patrick v. Commonwealth, 50 Va. App. 650, 653–54, 653 S.E.2d 288, 290 (2007)*, the Court of Appeals upheld a prior instruction which read, in pertinent part: "Proof of the exclusive personal possession by the [appellant] of recently stolen goods is a circumstance from which you may reasonably infer that the [appellant] was the thief unless the [appellant] offers a reasonable account of possession consistent with innocence which the Commonwealth has failed to prove untrue."

The Committee amended this instruction to avoid any concern that the prior instruction could be interpreted to require a defendant to explain his possession of recently stolen goods, compromising his constitutional right to remain silent.

The instruction maintains the inference from possession of recently stolen property but allows the jury to reject the inference if it has a reasonable doubt as to guilt upon consideration of all the evidence. The instruction assumes that the jury is fully instructed as to the burden of proof, and that a defendant in a criminal case is not required to testify and has no burden to produce any evidence.

***ALERTS*:**

• This instruction may not be given if permission to take the goods is a material issue in the case. *Barnes v. Commonwealth, 190 Va. 732, 739–40, 58 S.E.2d 12, 16 (1950).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

property but allows the jury to reject the inference if it has a reasonable doubt as to guilt upon consideration of all the evidence. [The instruction is proper] even [if] the defendant is required to testify and has no burden to produce any evidence.

ELEMENTS:

(1950)

RESEARCH REFERENCES:

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.1

MICHIE'S JURISPRUDENCE. Larceny §§ 1–33

Instruction No. 36.400

Grand Larceny—Receiving Stolen Goods

The defendant is charged with the crime of grand larceny by receiving stolen goods. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the** (describe goods) **were previously stolen from** (name person) **by some other person; and**

(2) **That the defendant** [bought or received them from another person; aided in concealing them] **with dishonest intent; and**

(3) **That at the time of** [receipt; aiding in concealing] **the defendant knew they had been stolen; and**

(4) **That the value of the goods was $1000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of grand larceny receiving stolen goods, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has not proved beyond a reasonable doubt that the value of such property was $1000 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of minimum or specific value), then you shall find the defendant guilty of the crime of petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the first three elements of the crime or failed to prove such property was of some value, then you shall find the defendant not guilty.

Grand Larceny—Receiving Stolen Goods

The defendant is charged with the crime of grand larceny by receiving stolen goods. The [illegible] charges a [illegible] kind of the following elements of the crime:

(1) That the [illegible] property was [illegible] from some person or persons other than [illegible];

(2) That the defendant [illegible] received them from another person aided in concealing them] with dishonest intent; and

(3) That at the time of [receipt and] concealing [illegible] the defendant knew they had been stolen; and

(4) That the value of the goods was $250 or more.

If you find from the evidence that the [illegible] has proved beyond a reasonable doubt each of the above elements of the crime charged, then you shall find the defendant guilty of grand larceny receiving stolen goods. But you shall not let the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the evidence that the [illegible] has proved beyond a reasonable doubt each of the first three elements of the crime charged, but has not proved beyond a reasonable doubt that the value of such property was $250 or more [illegible] a reasonable doubt that the value of such property was $250 or more (there need be no proof of more than a specific value), then you shall find the defendant guilty [illegible] grand larceny, but you shall not let the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable [illegible] you must find the defendant not guilty.

Instruction No. P36.400(a)

Grand Larceny—Receiving Stolen Goods

You have found the defendant guilty of the crime of grand larceny by receiving stolen goods.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Count I more,— Read-ing Skate Castle

You have found the defendant guilty of the crime of grand larceny by receiving stolen goods.

In addition to all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) [illegible] for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P36.400(b)

Receiving Stolen Goods—Misdemeanor

You have found the defendant guilty of the crime of petit larceny by receiving stolen goods.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-11, 18.2-108, 18.2-108.1, 18.2-95, 18.2-96.

CASE AUTHORITY:

Whitehead v. Commonwealth, 278 Va. 105, 112–14, 677 S.E.2d 265, 268–70 (2009); Wheeler v. Commonwealth, 44 Va. App. 689, 691–94, 607 S.E.2d 133, 134–36 (2005); Covil v. Commonwealth, 268 Va. 692, 694–96, 604 S.E.2d 79, 81–82 (2004); Bazemore v. Commonwealth, 42 Va. App. 203, 211–14, 590 S.E.2d 602, 606–07 (2004); Snow v. Commonwealth, 33 Va. App. 766, 775–76, 537 S.E.2d 6, 11 (2000); Shaver v. Commonwealth, 30 Va. App. 789, 800–01, 520 S.E.2d 393, 399 (1999); Bynum v. Commonwealth, 23 Va. App. 412, 419–20, 477 S.E.2d 750, 754 (1996); Cabbler v. Commonwealth, 212 Va. 520, 524, 184 S.E.2d 781, 783–84 (1971); Pasanello v. Commonwealth, 206 Va. 640, 643–44, 145 S.E.2d 200, 203 (1965); Parish v. Commonwealth, 206 Va. 627, 632, 145 S.E.2d 192, 196 (1965); Wright v. Commonwealth, 196 Va. 132, 133–34, 82 S.E.2d 603, 604 (1954).

PRACTICE COMMENTARY: The elements of the offense contained in the instruction are similar to those which the Commonwealth was required to prove in the *Parish* and *Pasanello* decisions. *206 Va. at 632, 145 S.E.2d at 196*; *206 Va. at 643–44, 145 S.E.2d at 203.*

PRACTICE POINTER:

While the subject of petit larceny must be an object of some value, no proof need be adduced of a specific value. *Evans v. Commonwealth, 226 Va. 292, 297, 308 S.E.2d 126, 129 (1983).*

A person who purchases goods tendered by the police during a sting operation is guilty even though the goods are not stolen. Va. Code Ann. § 18.2-108(B).

The acceptance of the proceeds of stolen goods does not constitute receipt of stolen goods for the purposes of Code § 18.2-108. *Whitehead, 278 Va. at 113, 677 S.E.2d at 269–70.*

ALERTS:

• Va. Code Ann. § 18.2-108 must be read in conjunction with Va. Code Ann. §§ 18.2-95 and 18.2-96 because the punishment provisions are drawn from those statutes. *Wright, 196 Va. at 133–34, 82 S.E.2d at 604.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33; and Receiving Stolen Goods §§ 1–8

Instruction No. 36.410

Receiving Stolen Goods—Possession Inference

If you believe from the evidence that the (describe goods) **were previously stolen from** (name person) **by some other person, then proof of the exclusive possession by the defendant of the recently stolen** (describe goods) **is a circumstance from which you may reasonably infer that the defendant received the** (describe goods) **knowing them to have been stolen and that he received them with dishonest intent. You may not so infer if from all of the evidence, you have a reasonable doubt as to whether the defendant received the** (describe goods) **knowing them to be stolen or whether he received them with dishonest intent.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Covil v. Commonwealth, 268 Va. 692, 695–96, 604 S.E.2d 79, 81–82 (2004); *Winston v. Commonwealth, 26 Va. App. 746, 757, 497 S.E.2d 141, 147 (1998)*; *Bynum v. Commonwealth, 23 Va. App. 412, 419–20, 477 S.E.2d 750, 754 (1996)*; *Reaves v. Commonwealth, 192 Va. 443, 451–52, 65 S.E.2d 559, 564 (1951)*.

PRACTICE COMMENTARY: The Supreme Court of Virginia's decision in *Reaves* provides the basis for the guilty-knowledge standard.

PRACTICE POINTER:

See also Instruction No. 36.300, which explains some of the terms used in this instruction and may be used with this instruction in appropriate factual situations.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW & PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33; and Receiving Stolen Goods §§ 1–8

Instruction No. 36.420

Receiving Stolen Goods—Supplemental Instructions

Knowledge that the goods were stolen need not be directly proved. It may be shown by circumstances which, if proved, must have caused the defendant to believe the goods were stolen.

Evidence that the property was obtained at less than true value, standing alone, is not sufficient to show that the defendant knew the goods were stolen.

If you believe from the evidence that the (describe goods) **were previously stolen from** (name person) **by some other person, then proof of the exclusive possession by the defendant of the recently stolen** (describe goods) **is a circumstance from which you may reasonably infer that the defendant received the** (describe goods) **knowing them to have been stolen and that he received them with dishonest intent, unless, from all of the evidence, you have a reasonable doubt as to whether the defendant received the** (describe goods) **knowing them to be stolen or whether he received them with dishonest intent.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Covil v. Commonwealth, 268 Va. 692, 695–96, 604 S.E.2d 79, 81–82 (2004); *Winston v. Commonwealth, 26 Va. App. 746, 757, 497 S.E.2d 141, 147 (1998)*; *Bynum v. Commonwealth, 23 Va. App. 412, 419–20, 477 S.E.2d 750, 754 (1996)*; *Reaves v. Commonwealth, 192 Va. 443, 451–52, 65 S.E.2d 559, 564 (1951).*

PRACTICE COMMENTARY: The Court in *Reaves* approved an instruction on which the prior instruction 36.420 was based. However, the Committee believes there are a number of reasons to revise the prior instruction, which are reflected in the new instruction. There is a valid reason for concern regarding the language in the prior instruction which could be interpreted to require a defendant to explain his possession of recently stolen goods, compromising his constitutional right to remain silent.

The instruction maintains the inference from possession of recently stolen property but allows the jury to reject the inference if it has a reasonable doubt as to guilt upon consideration of all the evidence. The instruction assumes that the jury is fully instructed as to the burden of proof, and that a defendant in a criminal case is not required to testify and has no burden to produce any evidence.

PRACTICE POINTER:

See also Instruction No. 36.300, which explains some of the terms used in this instruction and may be used with this instruction in appropriate factual situations.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33; and Receiving Stolen Goods §§ 1–8

Instruction No. 36.500

Unauthorized Use—Felony

The defendant is charged with the crime of unauthorized use. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [took; drove; used] (describe vehicle; animal; aircraft; boat; vessel); **and**

[(1) That the defendant [assisted; was a party or accessory; was an accomplice] in the [taking; driving; using] of (describe vehicle; animal; aircraft; boat; vessel); and]

(2) That it belonged to (name of person); **and**

(3) That the owner was not present and did not consent to the [taking; driving; using]; **and**

(4) That the intent of the defendant was to keep the property temporarily from its owner; and

(5) That the value of the property was $1000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of the felony of unauthorized use, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first four elements of the crime as charged, but has not proved beyond a reasonable doubt that the value of such property was $1000 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of minimum or specific value), then you shall find the defendant guilty of the misdemeanor of unauthorized use, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the first three elements of the crime or failed to prove such property was of some value, then you shall find the defendant not guilty.

Instruction No. P36.500(a)

Unauthorized Use—Felony

Punishment Phase:

You have found the defendant guilty of the crime of unauthorized use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P36.500(b)

Unauthorized Use—Misdemeanor

You have found the defendant guilty of the misdemeanor of unauthorized use.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-10, 18.2-11, 18.2-102.

CASE AUTHORITY:

Tucker v. Commonwealth, 268 Va. 490, 493–94, 604 S.E.2d 66, 68 (2004); Montague v. Commonwealth, 40 Va. App. 430, 436–39, 579 S.E.2d 667, 670–71 (2003); Hewitt v. Commonwealth, 213 Va. 605, 606, 194 S.E.2d 893, 894 (1973); Comer v. Commonwealth, 211 Va. 246, 250–51, 176 S.E.2d 432, 435 (1970).

PRACTICE COMMENTARY: As demonstrated in the decisions by the Supreme Court of Virginia in *Comer* and *Tucker*, the intent element distinguishes unauthorized use from larceny. *211 Va. at 250, 176 S.E.2d at 435*; *268 Va. at 494, 604 S.E.2d at 68*. With larceny, the intent is to deprive permanently, whereas with unauthorized use the intent to deprive the owner of his property is temporary. *Comer, 211 Va. at 250, 176 S.E.2d at 435*.

The Court clarified in *Hewitt,* however, that unauthorized use is a lesser offense included in the crime of larceny. *213 Va. at 606, 194 S.E.2d at 894*.

An intent to use and abandon a vehicle is larceny rather than unauthorized use because the intent is to deprive the owner permanently. *Robinson v. Commonwealth, 190 Va. 134, 143–44, 56 S.E.2d 367, 371–72 (1949).*

Under Va. Code Ann. § 18.2-102, the initial possession of a vehicle may be trespassory or consensual. *Tucker, 268 Va. at 494, 604 S.E.2d at 68*. Exceeding the owner's limitation on the use of a vehicle was held to be an unauthorized use in *Tucker. Id.* The instruction will need to be tailored if the owner initially granted consent, but the use exceeded the scope of that consent.

PRACTICE POINTER:

Va. Code Ann. § 18.2-102 provides for the conviction of those who aid and assist as well as those who actually take any of the vehicles specified in the statute. The elements of the crime contained in the instruction include both possibilities. If the evidence is clear, either Element (1) or Alternate (1), whichever is appropriate, may be used following the first paragraph of the instruction. If the jury could find that the defendant either took or aided in the taking, both could be included in the instruction. See also Va. Code Ann. § 18.2-118, which deals with leased property and provides a different penalty.

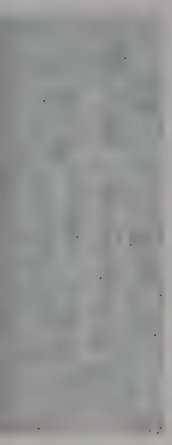
For statutes specifically addressing bailments and leased property see Va. Code Ann. §§ 18.2-117 and 18.2-118.

ALERTS:

• If the value of the property is less than $1000, the offense is a misdemeanor and the punishment is the same as that for petit larceny. (See Instruction No. 36.200.) See also the Note to Instruction No. 36.100.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"
John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18
MICHIE'S JURISPRUDENCE, Automobiles § 126; and Larceny §§ 1–33



Instruction No. 36.520

Unauthorized Use—Previous Consent

The consent of the owner of the [vehicle; animal; aircraft; boat; vessel] **to its** [taking; driving; use] **is not to be presumed or implied because of any consent by the owner on a previous occasion to** [the same; a different] **person.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-102.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Exceeding the owner's limitation on the use of a vehicle was held to be an unauthorized use in *Tucker v. Commonwealth, 268 Va. 490, 494–95, 604 S.E.2d 66, 68–69 (2004).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Automobiles § 126; and Larceny §§ 1–33

Instruction No. 36.600

Larceny of Certain Animals

The defendant is charged with the crime of larceny of a [dog; horse; pony; mule; cow; steer; bull; calf]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant took and carried away the (name of animal); **and**

(2) That the animal belonged to (name of person); **and**

(3) That the taking was against the will and without the consent of the owner; and

(4) That the taking was with the intent to steal.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.600

Larceny of Certain Animals

You have found the defendant guilty of the crime of larceny of a [dog; horse; pony; mule; cow; steer; bull; calf].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-10, 18.2-97.

CASE AUTHORITY:

Wolfe v. Commonwealth, 167 Va. 486, 488–89, 189 S.E. 320, 320–21 (1937).

PRACTICE COMMENTARY: The statute also makes it a Class 6 felony to steal poultry with a value of $5 to less than $1000 ($5 to less than $500 before July 1, 2020) or to steal a sheep, lamb, swine or goat with a value of less than $1000 (less than $500 before July 1, 2020). Practitioners should modify this instruction by adding an element as to value in cases involving poultry.

ALERTS:

• Value is not an element when the stolen item is a dog, horse, pony, mule, cow, steer, bull or calf, and the prosecution is based on Va. Code Ann. § 18.2-97 rather than Va. Code Ann. § 18.2-95. See generally the discussion in the *Wolfe* decision. *Wolfe* also establishes that the article "a" preceding the named animals does not denote only the singular. *167 Va. at 489, 189 S.E. at 321.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.800

Grand Larceny—Concealment of Goods or Merchandise

The defendant is charged with the crime of grand larceny by willful concealment of goods or merchandise. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant willfully** [concealed; took possession of] **the [goods; merchandise] of** (name of store or other mercantile establishment); **and**

(2) **That the defendant intended** [to convert the goods or merchandise to [his own; another's] use without having paid the full purchase price thereof; to defraud the owner of the value of the goods or merchandise]; **and**

(3) **That the defendant acted without authority to do so; and**

(4) **That the value of the goods was $1000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of grand larceny by willful concealment of goods or merchandise, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has not proved beyond a reasonable doubt that such property had a value of $1000 or more, and if you find beyond a reasonable doubt that such property was of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of the misdemeanor of petit larceny by willful concealment of goods or merchandise, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth failed to prove beyond a reasonable doubt any of the first three elements of the crime or failed to prove the merchandise was of some value, then you shall find the defendant not guilty.

Grand Larceny—Concealment of Goods or Silver Plate

The defendant is charged with the crime of grand larceny in that [illegible] personal property or some [illegible]. The Commonwealth must prove, [illegible] a reasonable doubt each of the following elements of that crime:

(1) That the property actually [illegible]

(2) That the defendant [illegible] property [illegible] that it belonged to [illegible] defraud the owner of the value of the goods or [illegible]; and

(3) That the defendant acted without authority to do so; and [illegible]

(4) That the value of the goods was $[illegible] or more.

If you find from the evidence that the Commonwealth has proved [illegible] more, and if you find beyond a reasonable doubt that no [illegible] property was of some value (there need be no proof of a minimum or specific value), then you shall find the defendant guilty of the misdemeanor of petit larceny. In making [illegible] proofs or memoranda. But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth failed to prove beyond a reasonable doubt [illegible] of some value, then you shall find the defendant not guilty.

Instruction No. P36.800

Grand Larceny—Concealment of Goods or Merchandise

You have found the defendant guilty of the crime of grand larceny by willful concealment of goods or merchandise.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-103, 18.2-95 (punishment).

CASE AUTHORITY:

Hulcher v. Commonwealth, 39 Va. App. 601, 606–09, 575 S.E.2d 579, 581–82 (2003); Johnson v. Commonwealth, 35 Va. App. 134, 139–40, 543 S.E.2d 605, 607–08 (2001), aff'd, 37 Va. App. 187, 555 S.E.2d 419 (2001).

PRACTICE COMMENTARY: The term "goods" has been construed to include both merchandise offered for sale and any other items of tangible personal property belonging to the merchant, including advertising materials, display racks, mirrors and the like. *Hulcher, 39 Va. App. at 606, 575 S.E.2d at 581.*

Va. Code Ann. § 18.2-103 further prohibits the altering of price tags or other price markings on goods or merchandise and the transfer of goods from one container to another as well as the counseling, assisting, aiding, or abetting of another in the performance of such acts. In *Johnson* the Court of Appeals holds that the plain language of the statute does not require proof of concealment *on the person. 35 Va. App. at 140, 543 S.E.2d at 608.*

☞ ***PRACTICE POINTER:***

See Instruction No. 36.820, where the value of the goods is less than $200.

☞ ***PRACTICE POINTER:***

See Instruction No. 36.840, regarding willful concealment as prima facie evidence of intent to convert and defraud the owner of the value of his goods.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Carig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.820

Petit Larceny—Concealment of Goods or Merchandise

The defendant is charged with the crime of petit larceny by willful concealment of goods or merchandise. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant willfully** [concealed; took possession of] **the** [goods; merchandise] **of** (name of store or other mercantile establishment)**; and**

(2) **That the defendant intended** [to convert the goods or merchandise to [his own; another's] use without having paid the full purchase price thereof; to defraud the owner of the value of the goods or merchandise]; **and**

(3) **That the defendant had no authority to do so.**

(4) **That the** [goods; merchandise] **were** (was) **of some value.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.820

Petit Larceny—Concealment of Merchandise, etc.

You have found the defendant guilty of the crime of petit larceny by willful concealment of merchandise.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-11, 18.2-103, 18.2-96 (punishment).

CASE AUTHORITY:

Hulcher v. Commonwealth, 39 Va. App. 601, 606–09, 575 S.E.2d 579, 581–82 (2003); Johnson v. Commonwealth, 35 Va. App. 134, 139–40, 543 S.E.2d 605, 607–08 (2001), aff'd, 37 Va. App. 187, 555 S.E.2d 419 (2001).

PRACTICE COMMENTARY: The term "goods" has been construed in the *Hulcher* decision by the Court of Appeals to include both merchandise offered for sale and any other items of tangible personal property belonging to the merchant, including advertising materials, display racks, mirrors and the like. 39 Va. App. at 606, 575 S.E.2d at 581.

☞ ***PRACTICE POINTER:***

See Instruction No. 36.840, regarding willful concealment as prima facie evidence of intent to convert and defraud the owner of the value of his goods. Va. Code Ann. § 8.01-44.4 creates a civil cause of action for merchants who are the victims of shoplifting as employee theft.

ALERTS:

• Where the defendant is accused of concealing or taking goods valued in excess of $1000 (in excess of $200 or more before July 1, 2018), grand larceny is charged, and Instruction No. 36.800 should be used.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18)

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.840

Willful Concealment—Prima Facie Evidence

Willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise, unless there is believable evidence to the contrary.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-103.

CASE AUTHORITY:

Lindsey v. Commonwealth, 293 Va. 1, 7–10, 795 S.E.2d 311, 314–15 (2017); *Johnson v. Commonwealth, 35 Va. App. 134, 139–40, 543 S.E.2d 605, 607–08 (2001), aff'd, 37 Va. App. 187, 555 S.E.2d 419 (2001).*

PRACTICE COMMENTARY: The Supreme Court has held that this instruction is a correct statement of law. *Lindsey, 293 Va. at 7–10, 795 S.E.2d at 314–15*. It creates a permissive inference that the jury is free to reject, rather than a mandatory presumption. *Id.*

While the statute uses the language "shall be prima facie evidence," in view of the United States Supreme Court's decision in *Mullaney v. Wilbur, 421 U.S. 684, 702, n.31 (1975)*, it seems preferable to formulate the rule as provided in the instruction. In this regard, see *Hodge v. Commonwealth, 217 Va. 338, 341–43, 228 S.E.2d 692, 695–97 (1976).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–33

Instruction No. 36.900

Tampering With Metering Device

The defendant is charged with the crime of tampering with a metering device which is part of a facility used to provide [oil; telephone; telegraph; electric; gas; water] **service to the public. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant tampered with a metering device which was part of a facility used to provide** [oil; telephone; telegraph; electric; gas; water] **service to the public; and**

(2) **That he did so with the intent to prevent the meter from properly registering the amount used; and**

(3) **That the defendant did the act without the authorization of the owner of the metering device.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P36.900

Tampering with Metering Device

You have found the defendant guilty of the crime of tampering with a metering device.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-163.

CASE AUTHORITY:

Cox v. Commonwealth, 220 Va. 22, 24–25, 255 S.E.2d 462, 463–64 (1979).

PRACTICE COMMENTARY: The statute is not limited to tampering but covers any intentional act to prevent the device from properly registering the amount used. If there is such an act which is not tampering, the instruction should be altered accordingly.

PRACTICE POINTER:

See Va. Code Ann. § 18.2-163(B) for prima facie evidence of intent to violate.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Electricity § 18; and Larceny §§ 1–33

CHAPTER 37

MALICIOUS WOUNDING, ASSAULT, BATTERY, AND RELATED OFFENSES

Scope Note

Instruction No. 37.050 Malicious Wounding—Aggravated

Instruction No. P37.050 Malicious Wounding—Aggravated

Instruction No. 37.100 Malicious Wounding and Lesser Included Offenses—Combined Instruction

Instruction No. P37.100(a) Malicious Wounding and Lesser Included Offenses—Malicious Wounding

Instruction No. P37.100(b) Malicious Wounding and Lesser Included Offenses—Unlawful Wounding

Instruction No. P37.100(c) Malicious Wounding and Lesser Included Offenses—Assault and Battery

Instruction No. 37.150 Strangulation

Instruction No. P37.150 Strangulation

Instruction No. 37.200 Malice—Definition

Instruction No. 37.250 Wound—Definition

Instruction No. 37.260 Bodily Injury—Definition

Instruction No. 37.300 Battery—Definition

Instruction No. 37.340 Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer, Firefighter, or Emergency Medical Services Personnel

Instruction No. P37.340(a) Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer, Firefighter, or Emergency Medical Services Personnel

Instruction No. P37.340(b) Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer Firefighter, or Emergency Medical Services Personnel—Lesser Included Offenses

Instruction No. 37.350 Assault—Definition

Instruction No. 37.351 Assault—Effect of Words

Instruction No. 37.352 Assault—Effect of Words

Instruction No. 37.360 Assault and Battery Against a Family or Household Member—Third or Subsequent Offense

Instruction No. P37.360(a) Assault and Battery Against a Family or Household

Member—Third or Subsequent Offense

Instruction No. P37.360(b) Assault and Battery Against a Family or Household Member—Third or Subsequent Offense—Lesser Included Offenses

Instruction No. 37.500 Doubt as to Grade of Offense

SCOPE NOTE

Instruction No. 37.050 covers aggravated malicious wounding, based on Va. Code Ann. § 18.2-51.2.

Instruction No. 37.100 is based on Va. Code Ann. § 18.2-51, commonly referred to as the maiming statute. This instruction covers the elements of malicious wounding and sets out the lesser included offenses of unlawful wounding and assault and battery in one instruction.

Instruction No. 37.150 covers the offense of strangulation. Va. Code Ann. § 18.2-51.6.

Instruction Nos. 37.200, 37.250, 37.260, 37.300, and 37.350 contain definitions of relevant terms, which are based solely on case law.

Instruction No. 37.340 covers assault and battery of a judge, law-enforcement officer, correctional officer, firefighter, and others. Instruction No. 37.360 covers assault and battery of a family or household member, third or subsequent offense.

Instruction Nos. 37.351 and 37.352 cover the principle that words alone cannot justify an assault.

Instruction No. 37.500 instructs jurors on how to resolve doubt about the grade of an offense when they are given a combined instruction, such as P37.100, containing lesser-included offenses.

Model instructions for the following offenses are not provided: malicious bodily injury to law enforcement officers, firefighters, etc.—Va. Code Ann. § 18.2-51.1; malicious bodily injury by means of a caustic substance or agent or use of any explosive or fire—Va. Code Ann. § 18.2-52; maliciously causing bodily injury by means of infectious biological substances or radiological agent—Va. Code Ann. § 18.2-52.1; shooting, stabbing, cutting, or wounding another in committing or attempting a felony—Va. Code Ann. § 18.2-53; attempts to poison—Va. Code Ann. § 18.2-54.1; adulteration of food, drink, drugs, and cosmetic or other substances—Va. Code Ann. § 18.2-54.2; bodily injuries caused by prisoners, probationers, and parolees—Va. Code Ann. § 18.2-55 (see also Prisoner Related Crimes); hazing of youth gang members—Va. Code Ann. § 18.2-55.1; hazing—Va. Code Ann. § 18.2-56; reckless handling of firearms—Va. Code Ann. § 18.2-56.1; pointing laser at law enforcement officer—Va. Code Ann. § 18.2-57.01; disarming a law enforcement or correctional officer—Va. Code Ann. § 18.2-57.02.

Instruction No. 37.050

Malicious Wounding—Aggravated

The defendant is charged with the crime of aggravated malicious wounding. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [shot, stabbed, cut, or wounded; caused bodily injury by any means to] (name of person)**; and**

(2) **That such** [shooting, stabbing, cutting, or wounding; bodily injury] **was with intent to kill or permanently maim, disfigure, disable** (name of person)**; and**

(3) **That the act was done with malice; and**

(4) **That as a result of the act** (name of person) **was severely injured and was caused to suffer permanent and significant physical impairment.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of aggravated malicious wounding.

Instruction No. P37.050

Malicious Wounding—Aggravated

You have found the defendant guilty of the crime of aggravated malicious wounding.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000; or

(3) A specific term of imprisonment, but not less than twenty (20) years; or

(4) A specific term of imprisonment, but not less than twenty (20) years and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-51.2.

Case Authority:

Landeck v. Commonwealth, 59 Va. App. 744, 761–63, 722 S.E.2d 643, 651–52 (2012); *Martinez v. Commonwealth, 42 Va. App. 9, 24–25, 590 S.E.2d 57, 64* (2003); *Robertson v. Commonwealth, 31 Va. App. 814, 823–24, 525 S.E.2d 640, 645 (2000)*; *Commonwealth v. Donkor, 256 Va. 443, 445–46, 507 S.E.2d 75, 76–77 (1998); Newton v. Commonwealth, 21 Va. App. 86, 90, 462 S.E.2d 117, 119 (1995); Branch v. Commonwealth, 14 Va. App. 836, 839-41, 419 S.E.2d 422, 424–26 (1992).*

Practice Commentary: When the aggravated malicious wounding instruction is given, Instruction No. 37.200, which defines malice, should also be given.

When the evidence supports the inclusion of lesser included offenses in the instruction, refer to Instruction No. 37.100, Malicious Wounding and Lesser Included Offenses—Combined Instruction, as a model.

Where a deadly weapon is used, malice may be inferred. *Fletcher v. Commonwealth, 72 VA. App. 493, 507, 849 S.E. 2d 594, 601 (2021)*; *Tizon v. Commonwealth, 60 Va. App. 1, 11, 723 S.E.2d 260, 265 (2012).* In such cases, Instruction No. 33.240, Malice—Inference From Use of Deadly Weapon should also be used.

Although the Supreme Court of Virginia has not expressly stated that the defendant must intend to permanently maim, disfigure, or disable in the context of aggravated malicious wounding, it has done so in the context of malicious wounding. *Burkeen v. Commonwealth, 286 Va. 255, 259, 749 S.E.2d 172, 174 (2013).* Therefore, a similar intent applies in the aggravated malicious wounding context *a fortiori.*

For a discussion as to what constitutes "permanent and significant physical impairment," see *Martinez, 42 Va. App. at 23–25, 590 S.E.2d at 64*; see also *Newton, 21 Va. App. at 90, 462 S.E.2d at 119.* "To prove an injury is permanent, the Commonwealth need not present definitive testimony that a victim's injuries will never improve, but instead can leave it to the common sense of the jury to determine if the injuries are permanent." *Lamm v. Commonwealth, 55 Va. App. 637, 644–45, 688 S.E.2d 295, 298–99 (2010).* The Court of Appeals held in *Ellis v. Commonwealth, 70 Va. App. 385, 392, 827 S.E.2d 786, 790 (2019),* that, in order for an injury to be "permanent" under Va. Code Ann. § 18.2-51.2, "the victim must survive, if only briefly," and that the evidence proved the victim "remained alive during intervals of the attack."

☞ ***Practice Pointer:***

Va. Code Ann. § 18.2-51.2(B), addresses the aggravated malicious wounding of a pregnant woman. In such a situation, this instruction should be modified

accordingly. *Hawkins v. Commonwealth, 64 Va. App. 650, 655–57, 770 S.E.2d 787, 789–90 (2015)* (holding surgical scar constituted permanent and significant physical impairment; but for shooting by defendant, victim would not have needed surgery).

ALERTS:

• Va. Code Ann. § 18.2-57.5(A), enacted in 2021, provides that "[a]nother person's actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation, a defense to any charge brought under this article (Article 4 of Chapter 4 of Title 18.2—Assaults and Bodily Woundings)." Notwithstanding that language, sub-section (B) states that the statute shall not be "construed to prevent a defendant from exercising his constitutionally protected rights, including his right to call for evidence in his favor that is relevant and otherwise admissible in a criminal prosecution." The scope and effect of this statute is unclear pending future appellate authority or legislative clarification.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.100

Malicious Wounding and Lesser Included Offenses—Combined Instruction

The defendant is charged with the crime of malicious wounding. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [shot, stabbed, cut, or wounded; caused bodily injury by any means to] (name of person)**; and**

(2) That such [shooting, stabbing, cutting, or wounding; bodily injury] **was with intent to kill or permanently maim, disfigure, or disable** (name of person)**; and**

(3) That the act was done with malice.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of malicious wounding, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but that the act was done unlawfully, and not maliciously, then you shall find the defendant guilty of unlawful wounding, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either malicious wounding or unlawful wounding but you do find beyond a reasonable doubt:

(1) That the defendant willfully touched (name of person) **without legal excuse or justification; and**

(2) That the touching was done in an angry, rude, insulting, or vengeful manner,

then you shall find the defendant guilty of assault and battery, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above crimes, then you shall find the defendant not guilty.

proves beyond a reasonable doubt each of the following elements of that crime:

(1) [illegible]
any person of [illegible]; and

(2) [illegible]
intent to kill or permanently maim, disfigure, or disable [illegible]; and

(3) [illegible]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of malicious wounding. But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of unlawful wounding but you do find beyond a reasonable doubt that [illegible]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either malicious wounding or unlawful wounding but you do find beyond a reasonable doubt

(1) That the defendant unlawfully [illegible] any person [illegible] and
cause or [illegible]; and

(2) That the touching was done in an angry, rude, insulting, or vengeful manner,

then you shall find the defendant guilty of assault and battery. But you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable

Instruction No. P37.100(a)

Malicious Wounding and Lesser Included Offenses—Malicious Wounding

You have found the defendant guilty of the crime of malicious wounding.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

Instruction No. P37.100(b)

Malicious Wounding and Lesser Included Offenses—Unlawful Wounding

You have found the defendant guilty of the crime of unlawful wounding.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P37.100(c)

Malicious Wounding and Lesser Included Offenses—Assault and Battery

You have found the defendant guilty of the crime of assault and battery.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-51; 18.2-57.

Case Authority:

Malicious and Unlawful Wounding:

Witherow v. Commonwealth, 65 Va. App. 557, 566–67, 779 S.E.2d 223, 228–29 (2015); Williams v. Commonwealth, 64 Va. App. 240, 249, 767 S.E.2d 252, 257 (2015); Johnson v. Commonwealth, 58 Va. App. 303, 323–27, 709 S.E.2d 175, 186–87 (2011); Commonwealth v. Vaughn, 263 Va. 31, 35–36, 557 S.E.2d 220, 222–23 (2002); Coleman v. Commonwealth, 261 Va. 196, 201, 539 S.E.2d 732, 734 (2001); Boone v. Commonwealth, 14 Va. App. 130, 132–33, 415 S.E.2d 250, 251–52 (1992); Barrett v. Commonwealth, 231 Va. 102, 107–09, 341 S.E.2d 190, 193–94 (1986); Fletcher v. Commonwealth, 209 Va. 636, 640, 166 S.E.2d 269, 272–73 (1969); Dawkins v. Commonwealth, 186 Va. 55, 63–64, 41 S.E.2d 500, 504–05 (1947); Johnson v. Commonwealth, 184 Va. 409, 412–13, 35 S.E.2d 594, 595 (1945); Gills v. Commonwealth, 141 Va. 445, 449, 126 S.E. 51, 53 (1925); Lee v. Commonwealth, 135 Va. 572, 577–78, 115 S.E. 671, 673 (1923).

Malicious Wounding:

Synan v. Commonwealth, 67 Va. App. 173, 187–89, 795 S.E.2d 464, 471–72 (2017); Burkeen v. Commonwealth, 286 Va. 255, 258–61, 749 S.E.2d 172, 174–75 (2013); Cuffee v. Commonwealth, 61 Va. App. 353, 368–71, 735 S.E.2d 693, 700–02 (2013); Knight v. Commonwealth, 61 Va. App. 148, 156–61, 733 S.E.2d 701, 705–07 (2012); English v. Commonwealth, 58 Va. App. 711, 718–21, 715 S.E.2d 391, 394–96 (2011); Johnson v. Commonwealth, 53 Va. App. 79, 99–105, 669 S.E.2d 368, 378–80 (2008); Holley v. Commonwealth, 44 Va. App. 228, 233–38, 604 S.E.2d 127, 129–32 (2004); Luck v. Commonwealth, 32 Va. App. 827, 831–34, 531 S.E.2d 41, 44 (2000); Robertson v. Commonwealth, 31 Va. App. 814, 822–24, 525 S.E.2d 640, 645 (2000); Commonwealth v. Donkor, 256 Va. 443, 445–47, 507 S.E.2d 75, 76–77 (1998); Williams v. Commonwealth, 13 Va. App. 393, 395–98, 412 S.E.2d 202, 203–05 (1991).

Unlawful Wounding:

David v. Commonwealth, 2 Va. App. 1, 3–5, 340 S.E.2d 576, 577–78 (1986); Blythe v. Commonwealth, 222 Va. 722, 724–27, 284 S.E.2d 796, 797–99 (1981); Banovitch v. Commonwealth, 196 Va. 210, 216–17, 83 S.E.2d 369, 373–74 (1954).

Assault and Battery:

Edwards v. Commonwealth, 65 Va. App. 655, 664–66, 779 S.E.2d 858, 862–63 (2015); Clark v. Commonwealth, 279 Va. 636, 640–43, 691 S.E.2d 786, 788–90 (2010); Carter v. Commonwealth, 269 Va. 44, 47–50, 606 S.E.2d 839, 841–42 (2005); Gilbert v. Commonwealth, 45 Va. App. 67, 70–72, 608 S.E.2d 509, 511–12 (2005); Zimmerman v. Commonwealth, 266 Va. 384, 387–88, 585 S.E.2d 538, 539–40 (2003); Perkins v. Commonwealth, 31 Va. App. 326, 330–31, 523 S.E.2d

512, 513–14 (2000); Boone v. Commonwealth, 14 Va. App. 130, 132–33, 415 S.E.2d 250, 251–52 (1992).

PRACTICE COMMENTARY: This instruction combines instructions for malicious wounding, unlawful wounding, and assault and battery. If there is evidence tending to support a lesser-included offense, the relevant portion of the combined instruction should be given. See *Witherow, 65 Va. App. at 570–72, 779 S.E.2d at 230–31* (holding that the lower court erred in refusing instructions that included lesser offenses of unlawful wounding and assault and battery and clarified reasonable doubt as to the degree of culpability between these lesser-included offenses); *Boone, 14 Va. App. at 132–34, 415 S.E.2d at 251–52* (holding that the lower court erred in refusing an instruction on the lesser-included offense of assault and battery); *Barrett, 231 Va. at 107, 341 S.E.2d at 193* (holding that the lower court erred in refusing an instruction for the lesser-included offense of unlawful wounding). But see *Vaughn, 263 Va. at 36–37, 557 S.E.2d at 223* (holding that the defendant was not entitled to an instruction on the lesser-included offense of assault and battery because there was no evidence that he lacked the specific intent to harm); *Donkor, 256 Va. at 446–47, 507 S.E.2d at 77* (holding that the defendant was not entitled to an instruction on the lesser-included offense of malicious wounding because there was not a scintilla of evidence that the injury was not severe or did not result in significant permanent injury).

When the malicious wounding instruction is given, Instruction No. 37.200, which defines malice, should be given as well. In addition, where a deadly weapon is used, malice may be inferred. *Fletcher v. Commonwealth, 72 Va. App. 493, 507, 849 S.E.2d 594, 601 (2021)*; *Tizon v. Commonwealth, 60 Va. App. 1, 11, 723 S.E.2d 260, 265 (2012)*; *Luck, 32 Va. App. at 834, 531 S.E.2d at 44*; *Gills, 141 Va. at 449, 126 S.E. at 53*. In such cases, Instruction No. 33.240, Malice—Inference From Use of Deadly Weapon should also be used.

Specific Intent to Maim. The Commonwealth must also prove that the defendant had a specific intent to maim, disfigure, or kill. *Commonwealth v. Perkins, 295 Va. 323, 812 S.E.2d 212 (2018)*; *Banovitch, 196 Va. at 216–18, 83 S.E.2d at 373–74*. Although the statute does not contain this requirement, in *Burkeen*, the Supreme Court expressed its agreement with the Court of Appeals' decision in *Johnson, 53 Va. App. at 101, 669 S.E.2d at 378*, that to be guilty of malicious wounding, a person must "intend to permanently, not merely temporarily, harm another person." *286 Va. at 259, 749 S.E.2d at 174*. See *Dawkins, 186 Va. at 62, 41 S.E.2d at 504* ("The actions of the defendant in breaking the nose of Rogers, and particularly in kneeing his genital organs, were actions peculiarly calculated to disfigure, or disable, and permanently disable."); see also *Lee, 135 Va. at 578, 115 S.E. at 673* ("[T]he intent to disable . . . must be understood as of a permanent disability, and not merely one which may be temporary.").

Ordinarily, an intent to maim may not be assumed from a blow with a bare fist. *Lee, 135 Va. at 578, 115 S.E. at 673*. However, when an assault with a bare fist is accompanied by circumstances of violence and brutality, an intent to kill may be

inferred. *Fletcher, 209 Va. at 640, 166 S.E.2d at 273.* A single blow with a fist may be sufficient to prove an intent to injure permanently under circumstances that show no provocation and an attack of great force and "unmitigated brutality." *Johnson, 53 Va. App. at 103–04, 669 S.E.2d at 380*; accord *Burkeen, 286 Va. at 258–61, 749 S.E.2d at 174–76.*

Unlawful Wounding and Heat of Passion. The Supreme Court has made clear that the mental state elements of unlawful wounding are the same as those of voluntary manslaughter. *Barrett, 231 Va. at 105, 341 S.E.2d at 192.* Heat of passion is determined by the nature and degree of the provocation, *Wilkins v. Commonwealth, 176 Va. 580, 583, 11 S.E.2d 653, 654–55 (1940)*, and may be founded upon rage, fear, or a combination of both. *McClung v. Commonwealth, 215 Va. 654, 657, 212 S.E.2d 290, 292 (1975).* "[W]here it is not the victim of the crime who provoked the defendant's heat of passion, the evidence will not support a finding of heat of passion." *Williams, 64 Va. App. at 249, 767 S.E.2d at 257.*

Assault and Battery. Assault and battery are common law crimes, so their elements are derived from the cases. Va. Code Ann. § 18.2-57 does not define assault and battery; it merely provides for the punishment of the offense, which is a Class 1 misdemeanor. The crime of assault occurs when there is an overt act intended to inflict bodily harm coupled with a present ability to inflict harm, or an overt act intended to place the victim in fear or apprehension of bodily harm, that creates a reasonable fear or apprehension in the victim. *Carter, 269 Va. at 47–48, 606 S.E.2d at 841–42*; *Zimmerman, 266 Va. at 387, 585 S.E.2d at 539.* However, "assault does not require that an assailant have the actual ability to inflict bodily harm." *Carter, 269 Va. at 45, 606 S.E.2d at 840.*

"Battery is the *actual infliction of corporal hurt* on another (e.g., the *least touching* of another's person), *willfully or in anger*, whether by the party's own hand, or by some means set in motion by him." *Jones v. Commonwealth, 184 Va. 679, 682, 36 S.E.2d 571, 572 (1946).* See *Zimmerman, 266 Va. at 387, 585 S.E.2d at 539.* "The slightest touching of another . . . if done in a rude, insolent or angry manner, constitutes a battery for which the law affords redress." *Adams v. Commonwealth, 33 Va. App. 463, 469, 534 S.E.2d 347, 350 (2000); Crosswhite v. Barnes, 139 Va. 471, 477, 124 S.E. 242, 244 (1924).*

Spitting in a person's face is sufficient unwanted contact to support an assault and battery conviction. *Gilbert, 45 Va. App. at 71–72, 608 S.E.2d at 511*; *Hardy v. Commonwealth, 58 Va. (17 Gratt.) 592, 601 (1867).*

Words alone cannot amount to an assault. See Instruction Nos. 37.351 and 37.352 for the effect of words on an assault. Words, however, are neither spoken in a vacuum nor separated from past conduct or the accompanying circumstances, and the totality of the circumstances may be sufficient to prove the necessary overt act. *Clark, 279 Va. at 640, 691 S.E.2d at 788.*

Multiple and Included Offenses. The Supreme Court of Virginia has held that a defendant may be convicted of both unlawful wounding and voluntary manslaughter for a single incident. *Blythe, 222 Va. at 725–27, 284 S.E.2d at 797–98.*

A defendant's convictions and punishments for malicious wounding and attempted murder of the same victim, arising from the same act, do not constitute double jeopardy. *Coleman, 261 Va. at 202, 539 S.E.2d at 735.*

No instruction is required on a lesser included offense if the evidence is sufficient to support the crime charged and there is no independent evidence warranting a conviction for a lesser included offense. *Vaughn, 263 Va. at 36, 557 S.E.2d at 222–23.*

☞ ***PRACTICE POINTER:***

If the indictment does not allege that the defendant acted with malice, he cannot be convicted of malicious wounding. *Legette v. Commonwealth, 33 Va. App. 221, 228, 532 S.E.2d 353, 356 (2000).*

☞ ***PRACTICE POINTER:***

For the distinction between wounding and bodily injury, see *Johnson, 184 Va. at 415–17, 35 S.E.2d at 596–97.*

☞ ***PRACTICE POINTER:***

The fist and knee of the defendant were held to be "means" under the malicious wounding statute in *Dawkins, 186 Va. at 63, 41 S.E.2d at 504.*

ALERTS:

• Va. Code Ann. § 18.2-57(A) (assault and battery) establishes a mandatory minimum sentence where the defendant intentionally selected the person against whom the offense was committed because of the victim's race, religious conviction, color, or national origin. Va. Code Ann § 18.2-57(B) makes the same conduct a Class 6 felony with a mandatory minimum sentence if the assault and battery results in bodily injury.

• Va. Code Ann.§ 18.2-57.5(A), enacted in 2021, provides that "[a]nother person's actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation, a defense to any charge brought under this article (Article 4 of Chapter 4 of Title 18.2—Assaults and Bodily Woundings). Notwithstanding that language, sub-section (B) states that the statute shall not be "construed to prevent a defendant from exercising his constitutionally protected rights, including his right to call for evidence in his favor that is relevant and otherwise admissible in a criminal prosecution." The scope and effect of this statute is unclear pending future appellate authority or legislative clarification.

• Va. Code Ann. § 18.2-57(C) makes the assault and battery of a judge, magistrate, law enforcement officer, correctional officer, firefighter, or emergency medical services personnel (among other listed individuals) a Class 6 felony with a mandatory minimum sentence and is covered by Instruction No. 37.340. For the crimes of maliciously or unlawfully causing bodily injury to a law enforcement officer, firefighter, search and rescue personnel, or emergency medical services personnel, see Va. Code Ann. § 18.2-51.1. The terms "law enforcement officer" and "search and rescue personnel" are defined in Va. Code Ann. § 18.2-51.1. The term

"firefighter" is defined in Va. Code. Ann. § 65.2-102, and the term "emergency medical services personnel" is defined in Va. Code. Ann. § 32.1-111.1 The statutory definitions, and the individuals covered by those statutes, are not identical to the definitions and individuals covered by Va. Code Ann. § 18.2-57(C) (Assault and Battery). In addition, Va. Code Ann. § 18.2-51.1 provides that malicious wounding under Va. Code Ann. § 18.2-51 is a lesser-included offense of malicious bodily injury under Va. Code Ann. § 18.2-51.1. See also *Luck, 32 Va. App. at 831–32, 531 S.E.2d at 43.*

• Va. Code Ann. § 18.2-57(D) establishes a mandatory minimum sentence where the defendant commits a battery against certain school employees engaged in the performance of their duties as such. Va. Code Ann. § 18.2-57.2 makes assault and battery of a family or household member, third or subsequent offense, a Class 6 felony and is covered by Instruction No. 37.360.

• Va. Code Ann. § 18.2-57(E) establishes a mandatory minimum sentence where the defendant commits a battery against a health care provider, as defined in Va. Code Ann. § 8.01-581.1, who is engaged in the performance of his duties as an emergency health care provider in an emergency room of a hospital or clinic or on the premises of any other facility rendering emergency medical care.

• Where a defendant charged with malicious felonious assault or malicious bodily wounding has at least twice previously been convicted of a felony, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.150

Strangulation

The defendant is charged with the crime of strangulation of another. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant, without consent, applied pressure to the neck of (name of person)**; and**

(2) That such pressure to the neck impeded the blood circulation or respiration of (name of person)**; and**

(3) That such pressure to the neck resulted in the wounding or bodily injury of (name of person)**; and**

(4) That the act was done knowingly, intentionally, and unlawfully.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of strangulation of another, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt strangulation of another, but you do find beyond a reasonable doubt:

(1) That the defendant willfully touched (name of person)**; and**

(2) That the touching was done without legal excuse or justification; and

(3) That the touching was done in an angry, rude, insulting, or vengeful manner; then you shall find the defendant guilty of assault and battery, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above crimes, then you shall find the defendant not guilty.

Instruction No. 37.120

Conspiracy

The defendant is charged with the crime of conspiracy to [murder]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That he agreed with [name of person] and [name of person] to [murder] [name of person]; and

(2) That one of them committed one of the following overt acts in order to accomplish the [murder] of [name of person]: [name of person] [describe act]; and

(3) That the act was done knowingly, intentionally, and unlawfully.

If you find that each of the above elements of the crime is proved, then you shall find the defendant guilty of conspiracy [to murder]; but you shall not find the defendant guilty of conspiracy [to murder] unless you find that each of the above elements has been proved and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt conviction of another, but you do find beyond a reasonable doubt

(1) That the defendant without authority handed [name of person]; and

(2) That the handing was done without legal excuse or justification; and

[murder; then you shall find the defendant guilty of assault and battery,] [but you shall not find the defendant guilty of assault and battery] unless you find that each of the above elements has been proved and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable

Instruction No. P37.150

Strangulation

You have found the defendant guilty of the felony of strangulation of another.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-51.6.

Case Authority:

Wandemberg v. Commonwealth, 70 Va. App. 124, 133–36, 825 S.E.2d 291, 296–97 (2019); *Ricks v. Commonwealth, 290 Va. 470, 473–81, 778 S.E.2d 332, 333–36 (2015); Dawson v. Commonwealth, 63 Va. App. 429, 433–37, 758 S.E.2d 94, 96–98 (2014).*

Practice Commentary:

None.

☞ ***Practice Pointer:***

None.

ALERTS:

• Va. Code Ann. § 18.2-57.5(A), enacted in 2021, provides that "[a]nother person's actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation, a defense to any charge brought under this article (Article 4 of Chapter 4 of Title 18.2—Assaults and Bodily Woundings). Notwithstanding that language, sub-section (B) states that the statute shall not be "construed to prevent a defendant from exercising his constitutionally protected rights, including his right to call for evidence in his favor that is relevant and otherwise admissible in a criminal prosecution." The scope and effect of this statute is unclear pending future appellate authority or legislative clarification.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 4.1–4.8

Michie's Jurisprudence, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Aaron J. Campbell and Kathleen B. Martin, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 47 U. Rich. L. Rev. 143, 180 (2012)

Instruction No. 37.200

Malice—Definition

Malice is that state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason. Malice may result from any unlawful or unjustifiable motive including anger, hatred, or revenge. You may, but are not required, to infer malice from any deliberate, willful, and cruel act against another, however sudden.

Heat of passion excludes malice when that heat of passion arises from provocation that reasonably produces an emotional state of mind such as hot blood, rage, anger, resentment, terror, or fear so as to cause one to act on impulse without conscious reflection. Heat of passion must be determined from circumstances as they appeared to the defendant, but those circumstances must be such as would have aroused heat of passion in a reasonable person.

If a person acts upon reflection or deliberation, or after his passion has cooled, or there has been a reasonable time or opportunity for cooling, then the act is not attributable to heat of passion.

Note:

If there is no claim of heat of passion, the second and third paragraphs of the instruction should not be given. If there is no issue pertaining to cooling of heat of passion, the third paragraph of the instruction should not be given.

Sources & Authority

Governing Statute:

None.

Case Authority:

Fletcher v. Commonwealth, 72 VA. App. 493, 507–08, 849 S.E.2d 594, 601 (2020); *Synan v. Commonwealth, 67 Va. App. 173, 187–88, 795 S.E.2d 464, 471–72 (2017); Williams v. Commonwealth, 64 Va. App. 240, 248–55, 767 S.E.2d 252, 256–60 (2015); Knight v. Commonwealth, 61 Va. App. 148, 156–57, 733 S.E.2d 701, 705 (2012)*; *Landeck v. Commonwealth, 59 Va. App. 744, 759–62, 722 S.E.2d 643, 650–52 (2012)*; *Robertson v. Commonwealth, 31 Va. App. 814, 823–24, 525 S.E.2d 640, 645–646 (2000)*; *Turner v. Commonwealth, 23 Va. App. 270, 274–75, 476 S.E.2d 504, 506–07 (1996), aff'd, 255 Va. 1, 492 S.E.2d 447 (1997); Doss v. Commonwealth, 23 Va. App. 679, 685–86, 479 S.E.2d 92, 95–96 (1996); Branch v. Commonwealth, 14 Va. App. 836, 841, 419 S.E.2d 422, 425–26 (1992); Mason v. Commonwealth, 7 Va. App. 339, 346–47, 373 S.E.2d 603, 606–07 (1988); Barrett v. Commonwealth, 231 Va. 102, 106, 341 S.E.2d 190, 192 (1986); Epperly v. Commonwealth, 224 Va. 214, 231, 294 S.E.2d 882, 892 (1982); Fletcher v. Commonwealth, 209 Va. 636, 640, 166 S.E.2d 269, 272–73 (1969); Thomas v. Commonwealth, 186 Va. 131, 139, 41 S.E.2d 476, 480 (1947).*

Practice Commentary: This instruction is identical to Instruction No. 33.220. See the Practice Commentary thereto.

The cases offer many definitions of the term malice.

Malice "inheres in the intentional doing of a wrongful act without legal justification or excuse, or as the result of ill will." *Fletcher, 209 Va. at 640, 166 S.E.2d at 272.* A more elaborate definition is offered *Thomas*:

> Malice, in this definition, is used in a technical sense, including not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive.

186 Va. at 139, 41 S.E.2d at 480.

Malice may be inferred from the deliberate use of a deadly weapon unless, from all the evidence, there is a reasonable doubt as to whether malice existed. *Strickler v. Commonwealth, 241 Va. 482, 495, 404 S.E. 2d 227, 236 (1991).* See Instruction No. 33.240, Malice—Inference From Use of Deadly Weapon.

Malice may also be inferred from "the combined force of concurrent and related circumstances." *Fletcher, 72 VA. App. at 508, 849 S.E.2d at 601.*

Malice vs. Heat of Passion: In *Landeck*, the defendant objected to the instruction tendered by the Commonwealth concerning heat of passion, which included the final paragraph of Instruction No. 37.200. The Court ruled that, based on the evidence presented at trial, viewed in the light most favorable to the proponent of the instruction (the Commonwealth), the jury could have inferred "there was a

reasonable opportunity" for the defendants' passions to cool.

> [T]he appropriate measure for determining whether there was an opportunity for passions to cool is the interval between the provocation and the act, not the time during which the *furor brevis* controls. If the evidence demonstrates that, during this interval, the accused reflected or deliberated, that his passion cooled, or that there was reasonable time or opportunity for cooling, then the wounding is attributable to malice and not heat of passion.

59 Va. App. at 759–60, 722 S.E.2d at 650–51.

"[W]here it is not the victim of the crime who provoked the defendant's heat of passion, the evidence will not support a finding of heat of passion." *Williams, 64 Va. App. at 249, 767 S.E.2d at 257.*

***ALERTS*:**

- For a discussion of implied malice, see *Knight, 61 Va. App. at 157, 733 S.E.2d at 705.*
- The language of the "Note" appearing in the instruction should be deleted after the required modifications are made to the instruction language and should not be given to the jury.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.250

Wound—Definition

A wound is a breach or disruption of the skin, or of the skin and flesh, produced by external violence. This includes a disruption of the internal skin, such as that within the mouth.

Sources & Authority

Governing Statute:

None.

Case Authority:

Johnson v. Commonwealth, 58 Va. App. 303, 317, 709 S.E.2d 175, 182 (2011); *Johnson v. Commonwealth, 184 Va. 409, 413, 35 S.E.2d 594, 595 (1945).*

Practice Commentary: A "wound" as defined in this section is distinct from a "bodily injury" as defined in Instruction No. 37.260.

Practice Pointer:

None.

Alerts:

None.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 4.1–4.8

Michie's Jurisprudence, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Aaron J. Campbell and Kathleen B. Martin, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 47 U. Rich. L. Rev. 143, 180 (2012)

Instruction No. 37.260

Bodily Injury—Definition

Bodily injury is an act that damages, harms, or hurts the body; is an impairment of a function of a bodily member, organ, or mental faculty; is an act of impairment of a physical condition; is an unjust or undeserved infliction of suffering or harm; or is any bodily hurt, whatsoever. The victim need not experience any observable wounds, cuts, bruises, broken bones, or breaking of the skin. Bodily injury includes internal as well as external injuries to the body.

Sources & Authority

Governing Statute:

None.

Case Authority:

Ricks v. Commonwealth, 290 Va. 470, 476–80, 778 S.E.2d 332, 334–37 (2015); *Gonzin v. Commonwealth, 59 Va. App. 1, 8, 716 S.E.2d 466, 470 (2011)*; *English v. Commonwealth, 58 Va. App. 711, 718–19, 715 S.E.2d 391, 395 (2011)*; *Luck v. Commonwealth, 32 Va. App. 827, 831–32, 531 S.E.2d 41, 43 (2000)*; *Bryant v. Commonwealth, 189 Va. 310, 316, 53 S.E.2d 54, 57 (1949).*

Practice Commentary: "To prove a bodily injury, the victim need not experience any observable wounds, cuts, or breaking of the skin. Nor must she offer proof of 'broken bones or bruises.' " *English, 58 Va. App. at 719, 715 S.E.2d at 395*; *Luck, 32 Va. App. at 831–32, 531 S.E.2d at 43*; *Campbell v. Commonwealth, 12 Va. App. 476, 483, 405 S.E.2d 1, 4 (1991).* "Bodily injury 'includes soft tissue injuries, at least those which require medical attention and have some residual effect.' " *English, 58 Va. App. at 719, 715 S.E.2d at 395.*

The term "bodily injury" appears in several of the malicious wounding family of offenses in Chapter 4, Article 4 of Title 18.2. See Va. Code Ann. §§ 18.2-51 (shooting, stabbing, etc., with intent to maim, kill, etc.), 18.2-51.1 (malicious bodily injury to law-enforcement officers, firefighters, search and rescue personnel, or emergency medical services personnel; penalty; lesser-included offense), 18.2-51.2 (aggravated malicious wounding; penalty), 18.2-51.6 (strangulation of another; penalty). As such, the case authority above largely interprets the term in the context of malicious wounding or its predecessor statutes. See *English, 58 Va. App. at 718–19, 715 S.E.2d 395*; *Luck, 32 Va. App. at 831–32, 531 S.E.2d 43* (construing the term for purposes of Va. Code Ann. § 18.2-51.1); *Bryant, 189 Va. at 316, 53 S.E.2d at 57* (construing the term as it appeared in the maiming statute that preceded malicious wounding). This definition has also been adopted, at least in part, by decisions interpreting criminal statutes in other portions of the Code. See *Dawson v. Commonwealth, 63 Va. App. 429, 758 S.E.2d 94 (2014)*; *Belew v. Commonwealth, 62 Va. App. 55, 62 n.2, 63, 741 S.E.2d 800, 803 n.2, 803–04 (2013)* (noting that *English*'s interpretation of "bodily injury" under Va. Code Ann. § 18.2-51 to include soft tissue and internal injuries is consistent with the proper construction of "injury" under Code Va. Code Ann. § 46.2-894, the felony hit-and-run statute).

In the context of strangulation, proof of complete and total loss of consciousness due to the strangulation is sufficient to show bodily injury. *Ricks, 290 Va. at 479–80; 778 S.E.2d at 336–37.*

Practice Pointer:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1-17; and Mayhem §§ 1–11

Aaron J. Campbell and Kathleen B. Martin, *Annual Survey of Virginia Law: Criminal Law and Procedure*, 47 U. RICH. L. REV. 143, 180 (2012)

Instruction No. 37.300

Battery—Definition

A battery is the willful touching of another, without legal excuse or justification, done in an angry, rude, insulting, or vengeful manner.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-57.

Case Authority:

Montague v. Commonwealth, 278 Va. 532, 541, 684 S.E.2d 583, 588–89 (2009); *Gilbert v. Commonwealth, 45 Va. App. 67, 70–72, 608 S.E.2d 509, 511 (2005)*; *Adams v. Commonwealth, 33 Va. App. 463, 468–70, 534 S.E.2d 347, 350–51 (2000)*; *Perkins v. Commonwealth, 31 Va. App. 326, 330–31, 523 S.E.2d 512, 513–14 (2000)*; *Gnadt v. Commonwealth, 27 Va. App. 148, 151, 497 S.E.2d 887, 888 (1998)*; *Harper v. Commonwealth, 196 Va. 723, 733, 85 S.E.2d 249, 255 (1955)*; *Jones v. Commonwealth, 184 Va. 679, 682, 36 S.E.2d 571, 572 (1946)*; *Davis v. Commonwealth, 150 Va. 611, 618, 143 S.E. 641, 643–44 (1928)*.

Practice Commentary: This definition is derived from the cases. The Supreme Court of Virginia has defined assault as an "attempt with force and violence, to do some bodily hurt to another, whether from wantonness or malice, by means calculated to produce the end if carried into execution; it is any act accompanied with circumstances denoting an intention, coupled with a present ability, to use actual violence against another person." *Montague, 278 Va. at 541, 684 S.E.2d at 588*; *Carter v. Commonwealth, 269 Va. 44, 47, 606 S.E.2d 839, 841 (2005)*; *Zimmerman v. Commonwealth, 266 Va. 384, 387, 585 S.E.2d 538, 539 (2003)*; *Jones, 184 Va. at 681, 36 S.E.2d at 572*. When the injury is actually inflicted, a battery has been committed, regardless of how small the injury might be. *Hardy v. Commonwealth, 58 Va. (17 Gratt.) 592, 601 (1867)*. "Battery is the *actual infliction of corporal hurt* on another (e.g., the *least touching* of another's person), *willfully or in anger*, whether by the party's own hand, or by some means set in motion by him." *Jones, 184 Va. at 682, 36 S.E.2d at 572*. "The slightest touching of another . . . if done in a rude, insolent or angry manner, constitutes a battery for which the law affords redress." *Adams, 33 Va. App. at 468, 534 S.E.2d at 350*; *Crosswhite v. Barnes, 139 Va. 471, 477, 124 S.E. 242, 244 (1924)*. Spitting in a person's face is sufficient unwanted contact to support an assault and battery conviction. *Gilbert, 45 Va. App. at 71–72, 608 S.E.2d at 511*; *Hardy, 58 Va. (17 Gratt.) at 601*.

"An assault and battery is the unlawful touching of another." *Perkins, 31 Va. App. at 330, 523 S.E.2d at 513*; *Gnadt, 27 Va. App. at 151, 497 S.E.2d at 888*. It is "the least touching of another, willfully or in anger." *Perkins, 31 Va. App. at 330, 523 S.E.2d at 513*. There is no requirement that the defendant intend any harm. A battery may be "done in a spirit of rudeness or insult." *Perkins, 31 Va. App. at 330, 523 S.E.2d at 513*. See also *Kelley v. Commonwealth, 69 Va. App. 617, 822 S.E.2d 375 (2019)* (holding co-worker's face while attempting to kiss her over her objection constituted a battery).

If a victim consents to the touching, the touching is not unlawful. A touching that exceeds the scope of consent is unlawful. *Gnadt, 27 Va. App. at 151, 497 S.E.2d*

at 888.

Va. Code Ann. § 18.2-57(G) provides an exception to the general definition of battery for certain physical contact by elementary and secondary school employees. That statute requires the court to give reasonable deference to judgment of such personnel. If such school employees' actions are unreasonable, the "school personnel exception" is inapplicable and conviction for battery may result. *Commonwealth v. Lambert, 292 Va. 748, 758–60, 793 S.E.2d 805, 809–10 (2016).*

Assault and battery is a Class 1 misdemeanor, Va. Code Ann. § 18.2-57 (A).The appropriate punishment provisions are set out in Instruction No. P37.100(c).

ALERTS:

• For assault and battery against a judge, magistrate, law enforcement officer, correctional officer, firefighter, or emergency services personnel, use Instruction No. 37.340; for battery against certain school personnel engaged in the performance of their duties, see Va. Code Ann. § 18.2-57(D); for assault and battery against a family or household member, third or subsequent offense, use Instruction No. 37.360.

• Va. Code Ann. § 18.2-51.6 makes strangulation a separate offense. See Instruction No. 37.150.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8 (3rd ed. 2002 & Supplements)

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.340

Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer, Firefighter, or Emergency Medical Services Personnel

The defendant is charged with the crime of [assault; assault and battery] **of a** [judge; magistrate; law-enforcement officer; applicable correctional personnel as defined in Va. Code Ann. § 53.1-1; person employed by the Department of Corrections directly involved in the care, treatment, or supervision of inmates in the custody of the Department or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility; person directly involved in the care, treatment, or supervision of persons in the custody of or under the supervision of the Department of Juvenile Justice; employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Service; firefighter as defined in Va. Code Ann. § 65.2-102; volunteer firefighter; emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency]**, engaged in the performance of his public duties. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant committed an [assault; assault and battery] **against** (name of person)**; and**

(2) That the defendant knew or had reason to know, when he committed the [assault; assault and battery] **that** (name of person) **was a** [judge; law-enforcement officer; applicable correctional personnel as defined in Va. Code Ann. § 53.1-1; person employed by the Department of Corrections directly involved in the care, treatment, or supervision of inmates in the custody of the Department or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility; person directly involved in the care, treatment, or supervision of persons in the custody of or under the supervision of the Department of Juvenile Justice; employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Service; firefighter as defined in Va. Code Ann. § 65.2-102; volunteer firefighter; emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency]**; and**

(3) That (name of person) **was engaged in the performance of his public duties as a** [judge; magistrate; law-enforcement officer; applicable correctional personnel as defined in Va. Code Ann. § 53.1-1; person employed by the Department of Corrections directly involved in the care, treatment, or supervision of inmates in the custody of the Department or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility; person directly involved in the care, treatment, or supervision of persons in the custody of or

under the supervision of the Department of Juvenile Justice; employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Service; firefighter as defined in Va. Code Ann. § 65.2-102; volunteer firefighter; emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency] **at the time the defendant committed the** [assault; assault and battery].

If you find that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of [assault; assault and battery] **of a** [judge; magistrate; law-enforcement officer; applicable correctional personnel as defined in Va. Code Ann. § 53.1-1; person employed by the Department of Corrections directly involved in the care, treatment, or supervision of inmates in the custody of the Department or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility; person directly involved in the care, treatment, or supervision of persons in the custody of or under the supervision of the Department of Juvenile Justice; employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Service; firefighter as defined in Va. Code Ann. § 65.2-102; volunteer firefighter; emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency], **[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged, but you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the remaining elements, you shall find the defendant guilty of [assault; assault and battery], **[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the crime, then you shall find the defendant not guilty.

Instruction No. P37.340(a)

Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer, Firefighter, or Emergency Medical Services Personnel

You have found the defendant guilty of the crime of [assault; assault and battery] **of a** [judge; magistrate; law-enforcement officer; applicable correctional personnel as defined in Va. Code Ann. § 53.1-1; person employed by the Department of Corrections directly involved in the care, treatment, or supervision of inmates in the custody of the Department or an employee of a local or regional correctional facility directly involved in the care, treatment, or supervision of inmates in the custody of the facility; person directly involved in the care, treatment, or supervision of persons in the custody of or under the supervision of the Department of Juvenile Justice; employee or other individual who provides control, care, or treatment of sexually violent predators committed to the custody of the Department of Behavioral Health and Developmental Service; firefighter as defined in Va. Code Ann. § 65.2-102; volunteer firefighter; emergency medical services personnel member who is employed by or is a volunteer of an emergency medical services agency].

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not less than six (6) months nor more than twelve (12) months; or

(3) Confinement in jail for a specific time, but not less than six (6) months nor more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P37.340(b)

Assault and Battery of Judge, Magistrate, Law-Enforcement Officer, Correctional Officer Firefighter, or Emergency Medical Services Personnel—Lesser Included Offenses

You have found the defendant guilty of the crime of [assault; assault and battery].

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-57(C).

Case Authority:

Montague v. Commonwealth, 278 Va. 532, 541, 684 S.E.2d 583, 588–89 (2009); *Rowe v. Commonwealth, 277 Va. 495, 503–05, 675 S.E.2d 161, 165–66 (2009)*; *Carter v. Commonwealth, 269 Va. 44, 47–51, 606 S.E.2d 839, 841–43 (2005)*; *South v. Commonwealth, 47 Va. App. 247, 251, 623 S.E.2d 419, 421 (2005)*; *Gilbert v. Commonwealth, 45 Va. App. 67, 70–72, 608 S.E.2d 509, 511 (2005); Davis v. Commonwealth, 44 Va. App. 562, 565–69, 605 S.E.2d 790, 791–93 (2004); Oulds v. Commonwealth, 260 Va. 210, 214, 532 S.E.2d 33, 35–36 (2000); Adams v. Commonwealth, 33 Va. App. 463, 468–71, 534 S.E.2d 347, 350–51 (2000).*

Practice Commentary: Only offenses against the specific personnel listed in the statute, Va. Code Ann. § 18.2-57(C), qualify for the felony enhancement under that subpart. As used in each respective section, "law-enforcement officer" is defined in Va. Code Ann. § 18.2-51.1 and Va. Code Ann. § 18.2-57(F), "correctional officer" is defined in Va. Code Ann. § 53.1-1, and "firefighter" is defined in Va. Code Ann. § 65.2-102 and in Va. Code Ann. § 18.2-57(C). "Judge" is defined in Va. Code Ann. § 18.2-57(F). If the victim's status, or the defendant's knowledge of that status, as a law-enforcement officer, correctional officer, or firefighter is an issue in the case, the jury should be given the relevant definition. U.S. Navy police officers are not "law enforcement officers" as defined in Va. Code Ann. § 18.2-57(F). *South, 47 Va. App. at 251, 623 S.E.2d at 421.*

The Supreme Court of Virginia held that an off-duty police officer was engaged in the performance of public duties within the meaning of Va. Code Ann. § 18.2-57(C) while making an arrest in the course of his authorized private employment at a shopping center. *Oulds, 260 Va. at 214, 532 S.E.2d at 35–36.* An off-duty policeman, not in uniform, driving a marked police car, and known to the defendant as a police officer, was engaged in the performance of public duties sufficient to satisfy the requirements for the crime. *Davis, 44 Va. App. at 570, 605 S.E.2d at 794.*

A defendant who, during a traffic stop, made a sudden movement but was only pointing his finger at a police officer in a manner similar to a pistol may constitute an assault sufficient to meet the requirement for this crime. *Carter, 269 Va. at 49–50, 606 S.E.2d at 842–43.* In *Gilbert, 45 Va. App. at 71, 608 S.E.2d at 511*, the Court held that spitting on a police officer constituted assault and battery, and the intent to do bodily harm was inferred as the natural and probable consequence of the defendant's act, which was deeply offensive and involved physical contact, thereby constituting an infliction of bodily harm.

A person has a limited common law right to resist arrest, using reasonable force, when the arresting officers have no probable cause for the arrest. *Doscoli v. Commonwealth, 66 Va. App. 419, 425, 786 S.E.2d 472, 475 (2016).*

If a person is convicted of assault and battery against one of the specified personnel in Va. Code Ann. § 18.2-57(C), a mandatory minimum term of imprisonment of six months is required.

ALERTS:

• Va. Code Ann. § 18.2-57.5(A), enacted in 2021, provides that "[a]nother person's actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation, a defense to any charge brought under this article (Article 4 of Chapter 4 of Title 18.2—Assaults and Bodily Woundings). Notwithstanding that language, sub-section (B) states that the statute shall not be "construed to prevent a defendant from exercising his constitutionally protected rights, including his right to call for evidence in his favor that is relevant and otherwise admissible in a criminal prosecution." The scope and effect of this statute is unclear pending future appellate authority or legislative clarification.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.350

Assault—Definition

An assault is [an overt act intended to do bodily harm to another together with the present ability to cause such harm; an overt act intended to place a person in fear or apprehension of bodily harm that creates in him a reasonable fear or apprehension].

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-57.

CASE AUTHORITY:

Synan v. Commonwealth, 67 Va. App. 173, 188-89, 795 S.E.2d 464, 471–72 (2017); Adeniran v. Commonwealth, 63 Va. App. 617, 623–25, 761 S.E.2d 782, 784–85 (2014); Clark v. Commonwealth, 279 Va. 636, 641, 691 S.E.2d 786, 789 (2010); Montague v. Commonwealth, 278 Va. 532, 541, 684 S.E.2d 583, 588–89 (2009); Carter v. Commonwealth, 269 Va. 44, 46–49, 606 S.E.2d 839, 840–42 (2005); Zimmerman v. Commonwealth, 266 Va. 384, 387–88, 585 S.E.2d 538, 539 (2003).

PRACTICE COMMENTARY: See Practice Commentary to Instruction No. 37.100. *Carter* furnishes a comprehensive discussion of the development of the law of assault in Virginia. See *269 Va. 44, 606 S.E.2d 839*. An "assault does not require that an assailant have the actual ability to inflict bodily harm." *Carter, 269 Va. at 45, 606 S.E.2d at 840.*

A defendant can be convicted of more than one assault if he commits "separate and distinct acts." *Hodnett v. Commonwealth, 56 Va. App. 234, 237, 692 S.E.2d 647, 648 (2010).* Whether the defendant's actions qualify as separate and distinct acts is a question of fact. *Id.*

Assault is not a lesser-included offense of unlawful shooting at an occupied vehicle (Va. Code Ann. § 18.2-154) since assault requires proof of specific intent to cause bodily injury, fear, or apprehension, while shooting at an occupied vehicle does not. *Armstead v. Commonwealth, 55 Va. App. 354, 362–63, 685 S.E.2d 876, 880 (2009).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

Instruction No. 37.351

Assault—Effect of Words

Words alone can never amount to an assault of any kind.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Clark v. Commonwealth, 279 Va. 636, 641–42, 691 S.E.2d 786, 788–89 (2010); *Caudill v. Commonwealth, 27 Va. App. 81, 85, 497 S.E.2d 513, 514–15 (1998)*; *Harper v. Commonwealth, 196 Va. 723, 727, 85 S.E.2d 249, 252 (1955).*

PRACTICE COMMENTARY: The Supreme Court of Virginia's decision in *Harper* establishes that words alone, no matter how insulting, do not justify or excuse a person in making an assault. *Harper, 196 Va. at 727, 85 S.E.2d at 252*. See also *Clark, 279 Va. 636, 642–43, 691 S.E.2d 786, 789–90*, where the Court held that actions indicating a purpose to inflict bodily contact or injury taken in the context of previous statements and actions were sufficient to support a conviction for the crime of assault.

Assault is not a lesser-included offense of robbery or attempted robbery because words alone can create sufficient intimidation to constitute robbery, yet words alone are never sufficient to constitute an assault. *Adeniran v. Commonwealth, 63 Va. App. 617, 624–25; 761 S.E.2d 782, 785 (2014).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; Mayhem §§ 1–11

Instruction No. 37.352

Assault—Effect of Words

Words alone, no matter how grievous or insulting, are never justification for assault [by force or violence].

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Clark v. Commonwealth, 279 Va. 636, 642–43, 691 S.E.2d 786, 789 (2010); *Harper v. Commonwealth, 196 Va. 723, 727, 85 S.E.2d 249,252 (1955); Read v. Commonwealth, 63 Va. (22 Gratt) 924, 938 (1872).*

PRACTICE COMMENTARY: See *Clark, 279 Va. 636, 642–43, 691 S.E.2d 786, 789–90*, where the Court held that actions indicating a purpose to inflict bodily contact or injury taken in the context of previous statements and actions were sufficient to support a conviction for the crime of assault.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; Mayhem §§ 1–11

Instruction No. 37.360

Assault and Battery Against a Family or Household Member—Third or Subsequent Offense

The defendant is charged with the crime of assault and battery against a family or household member, third or subsequent offense. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant committed an assault and battery against** (name of person)**; and**

(2) **That** (name of person) **was** [the defendant's (applicable family or household member under Va. Code Ann. § 16.1-228)**; and**

(3) **That the defendant has at least two prior convictions against a family or household member of** [(i) assault and battery against a family or household member, (ii) malicious or unlawful wounding (iii) aggravated malicious wounding, (iv) malicious wounding by means of a substance, (v) strangulation, or (vi) an offense under the law of any other jurisdiction which has the same elements of any of the above offenses, in any combination]**; and**

(4) **That each such prior offense occurred on a different date within 20 years of the current offense.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of assault and battery of a [family; household] **member, third or subsequent offense, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has proved beyond a reasonable doubt the first two elements of the crime as charged, but you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the remaining elements, you shall find the defendant guilty of assault and battery of a family or household member, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged, but you find that the Commonwealth has failed to prove that the person assaulted was a family or household member, then you shall find the defendant guilty of assault and battery, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the offense, then you shall find the defendant not guilty.

Instruction No. P37.360(a)

Assault and Battery Against a Family or Household Member—Third or Subsequent Offense

You have found the defendant guilty of the crime of assault and battery of a [family or household] **member, third or subsequent offense.**

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

Instruction No. P37.360(b)

Assault and Battery Against a Family or Household Member—Third or Subsequent Offense—Lesser Included Offenses

You have found the defendant guilty of [assault and battery of a family or household member; assault and battery].

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-57.2.

CASE AUTHORITY:

Rickman v. Commonwealth, 33 Va. App. 550, 554–59, 535 S.E.2d 187, 189–91 (2000).

PRACTICE COMMENTARY: The definition of "family or household member" as set out in Va. Code Ann. § 16.1-228 applies to this offense. Va. Code Ann. § 18.2-57.2(D).

☞ ***PRACTICE POINTER:***

For an analysis of what constitutes "cohabitation" within the meaning of Va. Code Ann. § 18.2-57.2, see *Rickman, 33 Va. App. at 555–59, 535 S.E.2d at 190–92. Rickman* was decided under a prior version of Va. Code Ann. § 18.2-57.2(D), now codified at Va. Code Ann. § 16.1-228.

When a defendant has been convicted of assault and the court has pronounced sentence from the bench, it is not necessary for the court to enter a written sentencing order for the conviction to be eligible as a predicate offense. *Lewis v. Commonwealth, 295 Va. 454, 465–68, 813 S.E.2d 732, 737–39 (2018).*

ALERTS:

• Va. Code Ann. § 18.2-57.5(A), enacted in 2021, provides that "[a]nother person's actual or perceived sex, gender, gender identity, or sexual orientation is not in and of itself, or together with an oral solicitation, a defense to any charge brought under this article (Article 4 of Chapter 4 of Title 18.2—Assaults and Bodily Woundings). Notwithstanding that language, sub-section (B) states that the statute shall not be "construed to prevent a defendant from exercising his constitutionally protected rights, including his right to call for evidence in his favor that is relevant and otherwise admissible in a criminal prosecution." The scope and effect of this statute is unclear pending future appellate authority or legislative clarification.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; Husband and Wife § 87; and Mayhem §§ 1–11

Instruction No. 37.500

Doubt as to Grade of Offense

If you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of the lesser offense. For example, if you have a reasonable doubt as to whether he is guilty of aggravated malicious wounding or malicious wounding, you shall find him guilty of malicious wounding; if you have a reasonable doubt as to whether he is guilty of malicious wounding or unlawful wounding, you shall find him guilty of unlawful wounding; if you have a reasonable doubt as to whether he is guilty of unlawful wounding or assault and battery, you shall find him guilty of assault and battery; if you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Crockett v. Commonwealth, 187 Va. 687, 696, 47 S.E.2d 377, 381 (1948).

PRACTICE COMMENTARY: In *Crockett,* an individual named Ward inflicted severe bodily injuries on Crockett. Shortly thereafter, Crockett shot and killed Ward. At Crockett's trial, an instruction similar to the above instruction was correctly given. The trial court, however, refused to give a specific instruction on involuntary manslaughter, and this refusal was held to be error. Therefore, while an instruction on doubt as to grade of the offense should include all possible findings, it does not serve as a substitute for a specific instruction "giving the evidential matter relied on" by the defendant "to reduce the crime to the grade justified by his evidence if believed." Specific instructions outlining and defining the relevant grades of the offense in considerable detail must be given in addition to this general instruction. *187 Va. at 696–97, 475 S.E.2d at 381–82.*

☞ ***PRACTICE POINTER:***

This same type of instruction is given in homicide cases. See Instruction No. 33.720, Doubt as to Grade of Offense.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; and Mayhem §§ 1–11

CHAPTER 38

MOB AND GANG-RELATED CRIMES

Scope Note

Instruction No. 38.100 **Wounding With Intent to Maim by Mob**

Instruction No. P38.100 **Wounding With Intent to Maim by Mob**

Instruction No. 38.150 **Murder by Mob**

Instruction No. P38.150 **Murder by Mob**

Instruction No. 38.175 **Acts of Violence by Mob**

Instruction No. 38.200 **Definition of Mob and Culpability of Members**

Instruction No. 38.300 **Participating in Criminal Act as Member of or Participant in a Criminal Street Gang**

Instruction No. P38.300 **Participating in Criminal Act as Member of or Participant in a Criminal Street Gang**

Instruction No. 38.400 **Adult participating in Criminal Act as a Member of or Participant in a Criminal Street Gang—Gang Includes Juvenile**

Instruction No. P38.400 **Adult participating in Criminal Act as a Member of or Participant in a Criminal Street Gang—Gang Includes Juvenile**

Instruction No. 38.500 **Recruitment for a Criminal Street Gang**

Instruction No. P38.500 **Recruitment for a Criminal Street Gang**

Instruction No. 38.510 **Adult Recruitment of Juvenile for Participation or Membership in Criminal Street Gang**

Instruction No. P38.510 **Adult Recruitment of Juvenile for Participation or Membership in Criminal Street Gang**

Instruction No. 38.600 **Criminal Street Gang—Definition**

SCOPE NOTE

These instructions cover mob crimes and crimes related to criminal street gangs, and they should not be confused with instructions governing Riot, Unlawful Assembly, and Obstruction, Chapter 46.

Instruction No. 38.100 covers the basic elements of wounding with intent to maim by mob set forth in Va. Code Ann. § 18.2-41. Instruction No. 38.150 sets forth the elements for murder committed by a member of a mob. Instruction No. 38.200 defines "mob" for purposes of these offenses. There is no instruction included for assault or battery by mob under Va. Code Ann. § 18.2-42. See Practice Commentary for Instruction No. P38.100 for a suggested assault or battery by mob instruction.

"Lynching" is defined by Va. Code Ann. § 18.2-39. Under Va. Code Ann. § 18.2-40, lynching is deemed murder. Va. Code Ann. §§ 18.2-43, 18.2-44, 18.2-45, and 18.2-46, address the apprehension and prosecution of participants in lynching, civil liability for lynching, and venue for related actions and prosecutions.

Instructions No. 38.300, 38.400, 38.500, and 38.510 cover criminal street gang participation and recruitment of others, including juveniles, for criminal street gangs. Instruction No. 38.600 defines "criminal street gang."

Va. Code Ann. § 18.2-46.3(A) makes it a crime to recruit a person to become a member of a criminal street gang. Instruction No. 38.500 lists the elements for recruitment of an adult for a criminal street gang. Instruction No. 38.510 lists the elements for recruitment of a juvenile for a criminal street gang. No instruction is included under Va. Code Ann. § 18.2-46.3(B) for threatening an individual, family or household member with death or bodily harm in order to encourage participation in a criminal street gang.

"Mob" is defined in Va. Code Ann. § 18.2-38. Definitions of terms relating to crimes by gangs, including "act of violence," "criminal street gang," and "predicate criminal act," are set out in Va. Code Ann. § 18.2-46.1.

Instruction No. 38.100

Wounding With Intent to Maim by Mob

The defendant is charged with the crime of being a member of a mob that [wounded; caused bodily injury to] **another. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant was a member of a mob; and

(2) That a member or members of that mob [wounded; caused bodily injury by any means to] (name of person); **and**

(3) That such [wounding; bodily injury] **was with intent to maim, disable, disfigure or kill** (name of person); **and**

(4) That such act was done maliciously or unlawfully.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.100

Wounding With Intent to Maim by Mob

You have found the defendant guilty of the crime of being a member of a mob that [wounded; caused bodily injury to] **another.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-41.

Case Authority:

Barnett v. Commonwealth, 73 Va. App. 111, 118–120, 855 S.E.2d 874, 877–878 (2021); *Johnson v. Commonwealth, 58 Va. App. 625, 633–35, 712 S.E.2d 751, 755–56 (2011)*; *Johnson v. Commonwealth, 58 Va. App. 303, 326–27, 709 S.E.2d 175, 187 (2011)*; *Hamilton v. Commonwealth, 279 Va. 94, 103–4, 688 S.E.2d 168, 173–74 (2010)*; *Paiz v. Commonwealth, 54 Va. App. 688, 698, 682 S.E.2d 71, 76 (2009)*; *Commonwealth v. Leal, 265 Va. 142, 574 S.E.2d 285 (2003)*; *Sheikh v. Commonwealth, 32 Va. App. 9, 13, 526 S.E.2d 271, 272–73 (2000)*; *Harrell v. Commonwealth, 11 Va. App. 1, 6–12, 396 S.E.2d 680, 682–85 (1990)*; *Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969)*; *Hagood v. Commonwealth, 157 Va. 918, 924, 162 S.E. 10, 12–13 (1932)*.

Practice Commentary: In *Harrell*, the Court of Appeals held that even though the evidence would sustain a conviction for malicious assault and battery under Va. Code Ann. § 18.2-51, if the defendant is charged only under Va. Code Ann. § 18.2-41 (malicious assault and battery while acting as a member of a mob), the conviction must be set aside where the evidence fails to prove that the defendant was part of a mob. "The criteria which distinguishes individual behavior while part of a group from 'mob' behavior is assembling for the specific purpose and with the specific intent of committing an assault and battery upon any person." *Harrell, 11 Va. App. at 7, 396 S.E.2d at 683*. See also *Abdullah v. Commonwealth, 53 Va. App. 750, 757–58, 675 S.E.2d 215, 219 (2009)* ("Under the Virginia Code, any collection of people, assembled for the purpose and with the intention of committing an assault or a battery upon any person without authority of law, shall be deemed a 'mob.' "). See Va. Code Ann. § 18.2-38 for the statutory definition of "mob."

In *Sheikh*, the Court of Appeals held that the defendant may be a member of a mob even if there is no evidence the members of the mob agreed on the manner or nature of the assault and battery or act of violence to be perpetrated, so long as they shared the intent to commit some assault, battery, or act of violence. *32 Va. App. at 13, 526 S.E.2d at 272*.

Assault and battery by mob under Va. Code Ann. § 18.2-42 is a lesser included offense of maiming by mob under Va. Code Ann. § 18.2-41. *Leal, 265 Va. at 145–46, 574 S.E.2d at 287*.

Convictions for both malicious wounding under Va. Code Ann. § 18.2-51 and wounding with intent to maim by mob under Va. Code Ann. § 18.2-41 do not violate principles of double jeopardy. *Johnson, 58 Va. App. at 327, 709 S.E.2d at 187*.

Every person composing a mob is criminally culpable even though the member may not have actively encouraged, aided, or countenanced the act. *Leal, 265 Va. at*

147, 574 S.E.2d at 288; *Harrell, 11 Va. App. at 8, 396 S.E.2d at 683.*

There is no instruction for assault or battery by mob under Va. Code Ann. § 18.2-42. However, this instruction can readily be modified to cover that offense by replacing elements (1) and (2) of the current instruction with the following:

(1) **That the defendant was a member of a mob; and**

(2) **That a member or members of that mob** [assaulted; battered] (name of person)**.**

The definition of battery, Instruction No. 37.300, or the definition of assault, Instruction No. 37.350, should be given with the assault or battery by mob instruction. The punishment instruction for a Class 1 misdemeanor, Instruction No. 54.700, should be given.

ALERTS:

• This crime should not be confused with Riot, Unlawful Assembly, and Obstruction (Chapter 46).

• There is no indication that a mob need be formed by more than two people. However, if only two people participated, indictment under the accessory statutes may be more practical. Va. Code Ann. §§ 18.2-18 and 18.2-19.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.150

Murder by Mob

The defendant is charged with the crime of being a member of a mob that killed (name of person). **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant was a member of a mob; and

(2) That a member or members of that mob committed an act of violence upon the body of (name of person)**; and**

(3) That the act of violence resulted in the death of (name of person)**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Murder by Jihad

The accused is charged with the crime of [illegible] and that the said

(1) [illegible] was a member of a gang; and

(2) [illegible] upon the body of (name of person); and

(3) That the act of violence resulted in the death of (name of person).

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.150

Murder by Mob

You have found the defendant guilty of the crime of murder while being a member of a mob. Upon consideration of all the evidence you shall fix the defendant's punishment at a specific term of imprisonment, but not less than five (5) years nor more than forty (40) years.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-39, 18.2-40.

CASE AUTHORITY:

Paiz v. Commonwealth, 54 Va. App. 688, 695, 682 S.E.2d 71, 74–75 (2009); Corado v. Commonwealth, 47 Va. App. 315, 325–28, 623 S.E.2d 452, 457–58 (2005).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-40 provides that "[e]very lynching shall be deemed murder. Any and every person composing a mob and any and every accessory thereto, by which any person is lynched, shall be guilty of murder . . . ."

Although the statute is entitled "lynching," in modern practice the statute has been used to prosecute murder committed by criminal street gangs. The Court of Appeals has interpreted it to be a predicate felony under Va. Code Ann. § 18.2-53.1. (Use or display of firearm in committing felony). Even though not specifically listed, it is included because it is a form of murder. *Paiz, 54 Va. App. at 695, 682 S.E.2d at 74–75.*

In the *Corado* decision, the Court of Appeals held that an instruction substantially identical to the Model Instruction "clearly and accurately stated the law" and was properly given. *47 Va. App. at 325–28, 623 S.E.2d at 457–58.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places," "Homicide," and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.175

Acts of Violence by Mob

The defendant is charged with the crime of being a member of a mob that committed an act of violence. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a member of a mob; and

(2) That a member or members of that mob committed [name of act of violence in Va. Code Ann. § 19.2-297.1]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-42.1, 19.2-297.1.

Case Authority:

Paiz v. Commonwealth, 54 Va. App. 688, 696–99, 682 S.E.2d 71, 75–76 (2009).

Practice Commentary: Use the punishment instruction for the specific violent offense committed by the mob.

It may be necessary to also give an instruction on the elements of the violent crime that the mob committed.

A criminal defendant who did not personally use or possess a firearm cannot be convicted for use of a firearm in the commission of a felony under Va. Code Ann. § 18.2-42.1 simply based on his membership in the mob. *Paiz, 54 Va. App. at 698, 682 S.E.2d at 76.*

Alerts:

None.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 4.9, 28.3, 53.3

Michie's Jurisprudence, Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.200

Definition of Mob and Culpability of Members

A mob is any collection of people assembled for the purpose and with the intention of committing an [assault; battery; name of act of violence in *Va. Code Ann. § 19.2-297.1*] **upon any person.**

[Once the mob is assembled for such purpose, every member of the mob is criminally responsible even though the member may not have actively encouraged, aided, or countenanced the act of (assault; battery; name of act of violence in *Va. Code Ann. § 19.2-297.1*).]

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-38.

Case Authority:

Hamilton v. Commonwealth, 279 Va. 94, 103, 688 S.E.2d 168, 174 (2010); Commonwealth v. Leal, 265 Va. 142, 145–47, 574 S.E.2d 285, 287–88 (2003); Sheikh v. Commonwealth, 32 Va. App. 9, 13, 526 S.E.2d 271 (2000); Harrell v. Commonwealth, 11 Va. App. 1, 6–12, 396 S.E.2d 680, 682–85 (1990); Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969); Hagood v. Commonwealth, 157 Va. 918, 924, 162 S.E. 10, 12 (1932).

Practice Commentary: The bracketed second paragraph of the instruction should only be given if the defendant maintains that he did not share the purpose or intention of the mob.

In order to constitute a "mob" for purposes of Va. Code Ann. § 18.2-41, a group need not have initially assembled for a violent purpose, but may be transformed into a mob by "[e]vents or emotionally charged circumstances," which cause it to adopt "an unlawful intent to commit violence." *Johnson v. Commonwealth, 58 Va. App. 625, 634–35, 712 S.E.2d 751, 756 (2011).*

An "act of violence" is defined in Va. Code Ann. § 19.2-297.1. It is not necessary that the "mob" agree on the manner or nature of the assault, battery, or act of violence as long as the intention of the assembled group is to commit some assault, battery, or act of violence. *Sheikh, 32 Va. App. at 13, 526 S.E.2d at 272.*

Alerts:

• There is no indication that a mob need be formed by more than two people. However, if only two people participated, indictment under the accessory statutes may be more practical. Va. Code Ann. §§ 18.2-18 and 18.2-19.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 4.9, 28.3, 53.3

Michie's Jurisprudence, Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.300

Participating in Criminal Act as Member of or Participant in a Criminal Street Gang

The defendant is charged with participating in (name of predicate criminal act) [for the benefit of; at the direction of; in association with] **a criminal street gang. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [actively participated in; was a member of] **a criminal street gang; and**

(2) **That the defendant knowingly and willfully participated in** (name of predicate criminal act); **and**

(3) **That** (name of predicate criminal act) **was committed** [for the benefit of; at the direction of; in association with] **a criminal street gang.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of participating in (name of predicate criminal act) **as a** [active participant in; member of] **a criminal street gang, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Count

The defendant is charged with participating in (name of public-servant/trial act) ([in the direction of/in association with] a criminal street gang). The prosecution must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [conducted/participated in the conduct of] a criminal street gang; and

(2) The defendant committed [or attempted to commit] [or solicited another person to commit] [or conspired with another person to commit] [or solicited another person to commit conduct that constituted an attempt to commit] [or conspired with another person to commit conduct that constituted an attempt to commit] (name of predicate criminal act) [or was convicted for the commission of (name of predicate criminal act)] [in the direction of/in association with] a criminal street gang.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime of (name of crime) and find the defendant guilty of participating in (name of crime) [in the direction of/in association with] a criminal street gang, [but you also find that the defendant has proved by a preponderance of the evidence that (name of affirmative defense)], then you shall find the defendant guilty.

If you find from the evidence that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.300

Participating in Criminal Act as Member of or Participant in a Criminal Street Gang

You have found the defendant guilty of the crime of participating in (name of predicate criminal act) **as a** [participant in; member of] **a criminal street gang.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-46.2.

Case Authority:

Holloman v. Commonwealth, 65 Va. App. 147, 160–61, 775 S.E.2d 434, 441 (2015); *Rushing v. Commonwealth, 284 Va. 270, 275–79, 726 S.E.2d 333, 336–39 (2012)*; *Taybron v. Commonwealth, 57 Va. App. 470, 481, 703 S.E.2d 270, 276 (2011)*; *Phillips v. Commonwealth, 56 Va. App. 526, 536–41, 694 S.E.2d 805, 810–13 (2010)*; *Hamilton v. Commonwealth, 279 Va. 94, 108–09, 688 S.E.2d 168, 176–77 (2010).*

Practice Commentary: A conviction under the statute requires proof of both the status and conduct of the defendant. The defendant must actively participate in, or be a member of, a criminal street gang (status), and must knowingly and willfully participate in a predicate criminal act committed for the benefit of, at the direction of, or in association with a criminal street gang (conduct). Predicate criminal acts are required to prove both elements. Under the status element, any member of the same criminal street gang as the defendant may be shown to have engaged in commission of predicate criminal acts, even if there is no personal connection between that gang member and the defendant. Under the conduct element, it must be shown that the defendant participated in the instant predicate criminal act. *Rushing, 284 Va. at 278, 726 S.E.2d at 339.*

The predicate criminal acts required by the statute to establish a criminal street gang must occur before, and not contemporaneously with, the offense for which the existence of the criminal street gang is required. *Phillips, 56 Va. App. 537–38, 694 S.E.2d at 810–11.*

Where one offense is admissible to prove another offense, both offenses are sufficiently connected to satisfy the joinder requirement. *Holloman, 65 Va. App. at 162, 775 S.E.2d at 442.*

Va. Code Ann. § 18.2-46.1, defining "criminal street gang", requires that the individual upon whose prior crimes the Commonwealth relies to establish the predicate criminal acts must be a member of the same ongoing association or group as the defendant. Where the gang of the defendant and the gang of the persons who committed the predicate criminal acts were separate local gangs loosely affiliated with a national gang, there was insufficient evidence to establish that the defendant and the persons committing the predicate criminal acts were part of the same ongoing group or association. *Taybron, 57 Va. App. at 481, 703 S.E.2d at 276.*

Instruction No. 38.600, defining criminal street gang, should be used in conjunction with this instruction.

Va. Code Ann. Section 18.2-46.3:3 provides that if the defendant violates Va. Code Ann. § 18.2-46.2 upon the property of a public or private school, or upon public property or any property open to public use within 1,000 feet of school property, or on a school bus, or upon any publicly owned or operated community

or recreation center, it is a felony punishable under Va. Code Ann. § 18.2-46.2, and the defendant shall be sentenced to a mandatory minimum term of two years imprisonment.

ALERTS:

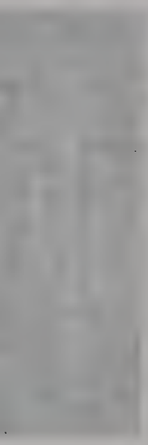
• See Instruction No. G38.400 when the gang includes juvenile members or participants.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Mobs, Riots and Lynchings §§ 1–4



Instruction No. 38.400

Adult participating in Criminal Act as a Member of or Participant in a Criminal Street Gang—Gang Includes Juvenile

The defendant is charged with participating in (name of predicate criminal act) [for the benefit of; at the direction of; in association with] **a criminal street gang which includes a juvenile member or participant. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [actively participated in; was member of] **a criminal street gang; and**

(2) **That the defendant knowingly and willfully participated in** (name of predicate criminal act); **and**

(3) **That** (name of predicate criminal act) **was committed** [for the benefit of; at the direction of; in association with] **a criminal street gang; and**

(4) **The defendant was 18 years of age or older at the time the** (name of predicate criminal act) **was committed; and**

(5) **The defendant** [knew; had reason to know] **that such criminal street gang included a participant or member who was younger than 18 years of age.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.400

Adult participating in Criminal Act as a Member of or Participant in a Criminal Street Gang—Gang Includes Juvenile

You have found the defendant guilty of the crime of participating in (name of predicate criminal act) **while a** [participant in; member of] **a criminal street gang which included a juvenile** [participant; member].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-46.2.

CASE AUTHORITY:

Phillips v. Commonwealth, 56 Va. App. 526, 537–38, 694 S.E.2d 805, 810–13 (2010); *Hamilton v. Commonwealth, 279 Va. 94, 108, 688 S.E.2d 168, 177 (2010).*

PRACTICE COMMENTARY: The predicate criminal acts required by the statute to establish a criminal street gang must occur before, and not contemporaneous with, the offense for which the existence of the criminal street gang is required. Thus, where the defendant is charged with the recruitment of a juvenile for a criminal street gang in violation of Va. Code Ann. § 18.2-46.3, the act of recruiting the juvenile cannot constitute a predicate offense. *Phillips, 56 Va. App. at 537–38, 694 S.E.2d at 810–11.*

The Commonwealth must prove as an element of this offense that the criminal street gang included a juvenile member at the time the defendant participated in the criminal act that benefited the gang. Evidence of recruitment activity of a juvenile to be a criminal street gang member prior to the criminal act is insufficient to establish this element of the offense. *Phillips, 56 Va. App. at 542, 694 S.E.2d at 813.*

Va. Code Ann. § 18.2-46.1, defining "criminal street gang," requires that the individuals upon whose prior crimes the Commonwealth relies to establish the predicate criminal acts must be members of the same ongoing association or group as the defendant. Where the gang of the defendant and the gang of the persons who committed the predicate criminal acts were separate local gangs loosely affiliated with a national gang, there was insufficient evidence to establish that the defendant and the persons committing the predicate criminal acts were part of the same ongoing group or association. *Taybron v. Commonwealth, 57 Va. App. 470, 483, 703 S.E.2d 270, 276 (2011).*

Instruction No. 38.600, defining criminal street gang, should be used in conjunction with this instruction.

Va. Code Ann. § 18.2-46.3:3 provides that if the defendant violates Va. Code Ann. § 18.2-46.2 upon the property of a public or private school, or upon public property or any property open to public use within 1,000 feet of school property, or on a school bus, it is a felony punishable under Va. Code Ann. § 18.2-46.2, and the defendant shall be sentenced to a mandatory minimum term of two years imprisonment.

ALERTS:

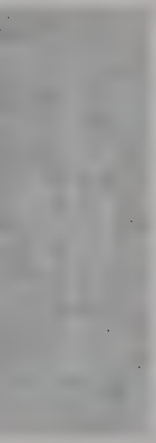
None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Mobs, Riots and Lynchings §§ 1–4



Instruction No. 38.500

Recruitment for a Criminal Street Gang

The defendant is charged with the crime of [soliciting; inviting; recruiting; encouraging; causing; attempting to cause] **another to** [participate in; become a member of] **a criminal street gang. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [solicited; invited; recruited; encouraged; caused; attempted to cause] **a person to** [actively participate in; become a member of] (name of organization, association or group); **and**

(2) **That** (name of organization, association or group) **was a criminal street gang; and**

(3) **That the defendant knew** (name of organization, association or group) **was a criminal street gang.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.500

Recruitment for a Criminal Street Gang

You have found the defendant guilty of the crime of [soliciting; inviting; recruiting; encouraging; causing; attempting to cause] **another to** [actively participate in; become a member of] **a criminal street gang.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-46.3.

CASE AUTHORITY:

Phillips v. Commonwealth, 56 Va. App. 526, 537–42, 694 S.E.2d 805, 810–13 (2010).

PRACTICE COMMENTARY: The predicate criminal acts required by the statute to establish a criminal street gang must occur before, and not contemporaneous with, the offense for which the existence of the criminal street gang is required. *Phillips, 56 Va. App. at 537–38, 694 S.E.2d at 810.*

Va. Code Ann. § 18.2-46.1, defining "criminal street gang", requires that the individuals upon whose prior crimes the Commonwealth relies to establish the predicate criminal acts must be members of the same ongoing association or group as the defendant. Where the gang of the defendant and the gang of the persons who committed the predicate criminal acts were separate local gangs loosely affiliated with a national gang, there was insufficient evidence to establish that the defendant and the persons committing the predicate criminal acts were part of the same ongoing group or association. *Taybron v. Commonwealth, 57 Va. App. 470, 481–82, 703 S.E.2d 270, 276–77 (2011).*

Instruction No. 38.600, defining criminal street gang, should be used in conjunction with this instruction.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation," "Disorderly Conduct and Places," and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 19.1–19.3, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–2, 7–9; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.510

Adult Recruitment of Juvenile for Participation or Membership in Criminal Street Gang

The defendant is charged with the crime of [soliciting; inviting; recruiting; encouraging; causing; attempting to cause] **a person younger than 18 years of age to** [actively participate in; become a member of] **a criminal street gang. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant was, at the time of the alleged crime, 18 years of age or older; and**

(2) **That** (name of organization, association or group) **was a criminal street gang; and**

(3) **That the defendant** [solicited; invited; recruited; encouraged; caused; attempted to cause] **a person who was younger than 18 years of age to** [actively participate in; become a member of] (name of organization, association or group); **and**

(4) **That the defendant knew** (name of organization, association or group) **was a criminal street gang.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P38.510

Adult Recruitment of Juvenile for Participation or Membership in Criminal Street Gang

You have found the defendant guilty of the crime of [soliciting; inviting; recruiting; encouraging; causing; attempting to cause] **a juvenile to** [actively participate in; become a member of] **a criminal street gang.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-46.3.

CASE AUTHORITY:

Phillips v. Commonwealth, 56 Va. App. 526, 537–38, 694 S.E.2d 805, 810–11 (2010).

PRACTICE COMMENTARY: The predicate criminal acts required by the statute to establish a criminal street gang must occur before, and not contemporaneous with, the offence for which the existence of the criminal street gang is required. Thus, where the defendant is charged with the recruitment of a juvenile for a criminal street gang in violation of Va. Code Ann. § 18.2-46.3, the act of recruiting the juvenile cannot constitute the predicate offense. *Phillips, 56 Va. App. at 537–38, 694 S.E.2d at 810–11.*

Va. Code Ann. § 18.2-46.1, defining "criminal street gang", requires that the individual upon whose prior crimes the Commonwealth relies to establish the predicate criminal acts must be members of the same ongoing association or group as the defendant. Where the gang of the defendant and the gang of the persons who committed the predicate criminal acts were separate local gangs loosely affiliated with a national gang, there was insufficient evidence to establish that the defendant and the persons committing the predicate criminal acts were part of the same ongoing group or association. *Taybron v. Commonwealth, 57 Va. App. 470, 481–82, 703 S.E.2d 270, 276–77 (2011).*

Instruction No. 38.600, defining criminal street gang, should be used in conjunction with this instruction.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation," "Disorderly Conduct and Places," and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 19.1–19.3, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–2, 7–9; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 38.600

Criminal Street Gang—Definition

A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal:

(1) Which has as one of its primary objectives or activities the commission of one or more criminal activities; and

(2) Which has an identifiable name or identifying sign or symbol; and

(3) Whose members individually or collectively have [engaged in the commission of; attempted to commit; conspired to commit; solicited] **two or more** (list applicable predicate criminal acts), **at least one of which is** (name of applicable act(s) of violence from Va. Code Ann. § 19.2-297.1)**; and**

(4) Such criminal acts were not part of a common act or transaction.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-46.1.

CASE AUTHORITY:

Holloman v. Commonwealth, 65 Va. App. 147, 160–61, 775 S.E.2d 434, 441 (2015); *Rushing v. Commonwealth, 284 Va. 270, 275–79, 726 S.E.2d 333, 336–39 (2012)*; *Johnson v. Commonwealth, 58 Va. App. 625, 641, 712 S.E.2d 751, 759 (2011)*; *Taybron v. Commonwealth, 57 Va. App. 470, 481, 703 S.E.2d 270, 276 (2011)*; *Phillips v. Commonwealth, 56 Va. App. 526, 535–41, 694 S.E.2d 805, 810–13 (2010).*

PRACTICE COMMENTARY: The statute requires that the individuals upon whose prior crimes the Commonwealth relies to establish the predicate criminal acts must be members of the same ongoing association or group as the defendant. Where the gang of the defendant and the gang of the persons who committed the predicate criminal acts were separate local gangs loosely affiliated with a national gang, there was insufficient evidence to establish that the defendant and the persons committing the predicate criminal acts were part of the same ongoing group or association. *Taybron, 57 Va. App. at 481–82, 703 S.E.2d at 276–77.*

The predicate criminal acts required by the statute to establish the criminal street gang must occur before, and not contemporaneously with, the offense for which the existence of the criminal street gang is required. Thus, where the defendant is charged with the recruitment of a juvenile for a criminal street gang in violation of Va. Code Ann. § 18.2-46.3, the act of recruiting the juvenile cannot constitute a predicate offense. *Phillips, 56 Va. App. at 537–38, 694 S.E.2d at 810–11.*

In order to prove that a gang is a "criminal street gang" as defined in Va. Code Ann. § 18.2-46.1, the Commonwealth must establish that members of the gang committed two or more predicate criminal acts, at least one of which was a crime of violence. The gang member committing a predicate criminal act must have been a member of the gang at the time he committed the act. *Rushing, 284 Va. at 277–78, 726 S.E.2d at 338–39.*

The predicate criminal acts required by the statute to establish the criminal street gang need not be gang related. *Johnson, 58 Va. App. at 641, 712 S.E.2d at 759.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places" and "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.9, 28.3, 53.3

MICHIE'S JURISPRUDENCE, Mobs, Riots and Lynchings §§ 1–4

CHAPTER 39

NONSUPPORT

Scope Note

Instruction No. 39.100 Nonsupport of Spouse or Children

Instruction No. P39.100 Nonsupport of Spouse or Children

Instruction No. 39.200 Neglect or Desertion—Inference of Willfulness

Instruction No. 39.250 Inference of Intent to Abandon

Instruction No. 39.300 Nonsupport of Parents by Children

Instruction No. P39.300 Nonsupport of Parents by Children

SCOPE NOTE

As the instructions indicate, the duty of support runs not only from parent to child but also may run from child to parent.

Instruction No. 39.100, based on Va. Code Ann. § 20-61, deals with nonsupport of a spouse or children. Instruction No. 39.200, based on Va. Code Ann. § 20-81, allows an inference of willfulness where a defendant deserts or neglects his spouse or children. Instruction No. 39.300, based on Va. Code Ann. § 20-88, deals with nonsupport of parents by children.

Instruction No. 39.100

Nonsupport of Spouse or Children

The defendant is charged with the crime of [desertion; nonsupport]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant, without cause,** [deserted; willfully neglected; refused or failed to provide for the support and maintenance of] **his or her** spouse; child under the age of eighteen (18) years of age; child who is crippled or otherwise incapacitated from earning a living]**; and**

(2) **That the defendant's** [spouse; child; children] [is; are] **in necessitous circumstances.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of nonsupport, [but you shall not fix punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P39.100

Nonsupport of Spouse or Children

You have found the defendant guilty of the crime of [desertion; nonsupport]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 20-61.

Case Authority:

Williams v. Commonwealth, 57 Va. App. 750, 764, 706 S.E.2d 530, 537 (2011); *Bennett v. Commonwealth, 22 Va. App. 684, 691–92, 472 S.E.2d 668, 672 (1996)*; *superseded in part by statute as noted in Murphy v. Murphy, 65 Va. App. 581, 593 n.7, 779 S.E.2d 236, 241 (2015)*; *Compton v. Commonwealth, 239 Va. 312, 313, 389 S.E.2d 460, 461 (1990); Painter v. Commonwealth, 140 Va. 459, 461–66, 124 S.E. 431, 431–32 (1924); Butler v. Commonwealth, 132 Va. 609, 613–15, 110 S.E. 868, 869–70 (1922); Burton v. Commonwealth, 109 Va. 800, 804–06, 63 S.E. 464, 466–67 (1909).*

Practice Commentary: A parent owes a duty of support only to his natural or legally adopted child. See *T. v. T., 216 Va. 867, 869, 224 S.E.2d 148, 150 (1976)*. The mere status as husband does not make a man liable for the support of his wife's illegitimate child born before or after marriage. *NPA v. WBA, 8 Va. App. 246, 249, 380 S.E.2d 178, 180 (1989)*. However, the law presumes legitimacy of a child born in wedlock, and the presumption can be rebutted only by strong, distinct, satisfactory, and conclusive evidence. *Id.*

Va. Code Ann. § 20-67 specifies that all proceedings under Va. Code Ann. § 20-61 shall be held in juvenile and domestic relations courts, which have exclusive and original jurisdiction over such cases. The sole exception arises in cases of fugitives from the State. In those circumstances the circuit court where the fugitive is indicted may, in its discretion, hear the case. *Id.* Most cases, therefore, will not involve a jury trial initially since they will originate in juvenile and domestic relations courts. The defendant will have the right to a jury trial in circuit court, however, on a trial de novo appeal.

In addition to the penalties of a fine or confinement to be imposed by the jury, Va. Code Ann. § 20-61 allows the judge in his discretion to impose a forfeiture of $1,000 or less in lieu of other punishment or to provide in the sentence for work release. The court may direct further that any fine, forfeiture, or money earned while on work release be paid in whole or in part to the needy spouse, or children, or guardian. *Id.*

Va. Code Ann. § 20-61 is designed to punish the willful neglect and nonsupport of a family in necessitous circumstances. Thus, to warrant a conviction, the desertion must be without just cause. *Painter, 140 Va. at 464, 124 S.E. at 432*. In *Burton*, the Supreme Court held that a series of arguments, caused in whole or part by the wife, did not constitute just cause for desertion by the husband or willful neglect to support his family. *109 Va. at 804–05, 63 S.E. at 466*. In *Butler,* a case involving the criminal prosecution of a father for failure to support his infant children, the Court held that there was no criminal liability since the wife had, without reasonable excuse, taken the children and moved to another state. *132 Va.*

at 613, 110 S.E. at 869.

In *Painter*, the Court instructed that although proof of desertion is prima facie evidence that such desertion is willful, evidence of the absolute inability of the accused to contribute anything to the support of his family will bar a prosecution for desertion and nonsupport. *140 Va. at 464–65, 124 S.E. at 432.* In this case the husband's will and mental power were destroyed by his excessive use of drugs. *Id.*

Independently of the criminal provisions Va. Code Ann. § 20-61, the Supreme Court of Virginia has recognized a common law civil duty to support an adult child who is mentally incapacitated if the parent has sufficient funds to do so. *Commonwealth Dep't of Mental Hygiene & Hosps. v. Shepard, 212 Va. 843, 847, 188 S.E.2d 99, 102 (1972).*

☞ ***PRACTICE POINTER:***

What constitutes necessitous circumstances under Va. Code Ann. § 20-61 depends upon the circumstances of the particular case, and the Court held in *Burton* that this is a question for the jury, subject to review by the court in a proper case and upon familiar principles. *Burton, 109 Va. at 804–05, 63 S.E. at 466.* See also *Williams, 57 Va. App. at 765, 706 S.E.2d at 537.* The Commonwealth need not prove that the defendant caused the necessitous circumstances. *Williams, 57 Va. App. at 766, 706 S.E.2d at 537.*

ALERTS:

• It should be noted that Va. Code Ann. § 20-61 also penalizes failure of a parent to provide for the support and maintenance of his or her child of any age who is crippled or otherwise incapacitated from earning a living and is in necessitous circumstances. Exempted from such a penalty, however, is any parent whose child of any age qualifies for and is receiving aid under a Federal or State program for aid to the permanently disabled or is an adult who meets the visual requirements for aid to the blind. Should need for an instruction on this subject arise, the additional elements should be substituted for or appended to the basic instruction using appropriate statutory language.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

MICHIE'S JURISPRUDENCE, Husband and Wife §§ 21–24, 87, 88; and Parent and Child § 19

Instruction No. 39.200

Neglect or Desertion—Inference of Willfulness

If you find from the evidence that the defendant deserted or neglected his or her [spouse; child; children]**, you may infer that such desertion or neglect was willful unless, from all the evidence, you have a reasonable doubt that the desertion or neglect was willful.**

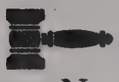
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 20-81.

CASE AUTHORITY:

Williams v. Commonwealth, 57 Va. App. 750, 764, 706 S.E.2d 530, 537 (2011); *Painter v. Commonwealth, 140 Va. 459, 461–62, 124 S.E.2d 431 (1924).*



PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

MICHIE'S JURISPRUDENCE, Husband and Wife §§ 21–24, 87, 88; and Parent and Child § 19

Instruction No. 39.250

Inference of Intent to Abandon

If you find from the evidence that the defendant left his or her [spouse; child; children] **in destitute or necessitous circumstances or contributed nothing to the support of his or her** [spouse; child; children] **for a period of thirty days prior and/or subsequent to his departure, you may infer that the defendant intended to abandon such** [spouse; child; children] **unless, from all the evidence, you have a reasonable doubt that the abandonment was willful.**

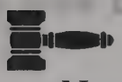
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 20-81.

CASE AUTHORITY:

Williams v. Commonwealth, 57 Va. App. 750, 765–66, 706 S.E.2d 530, 537–38 (2011)



PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

MICHIE'S JURISPRUDENCE, Husband and Wife §§ 21–24, 87, 88; and Parent and Child § 19

Instruction No. 39.300

Nonsupport of Parents by Children

The defendant is charged with the crime of nonsupport of his or her [parents; mother; father]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That an order was entered on** (date) **by the** [Juvenile and Domestic Relations; Circuit] **Court requiring the defendant to assist in providing for the support and maintenance of his or her** [parents; mother; father]; **and**

(2) **That the defendant failed to comply with that order.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, you shall find the defendant guilty of nonsupport of a parent by [a child; children], **[but you shall not fix punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

the support and maintenance of his or her [parents; mother; father]; and

Instruction No. P39.300

Nonsupport of Parents by Children

You have found the defendant guilty of the crime of nonsupport of a parent.

Upon consideration of all the evidence you have heard, you shall fix punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 20-88.

CASE AUTHORITY:

Bagwell v. Doyle & Russell, 187 Va. 844, 854, 48 S.E.2d 229, 234 (1948); Mitchell-Powers Hardware Co. v. Eaton, 171 Va. 255, 262–63, 198 S.E. 496, 499–500 (1938).

PRACTICE COMMENTARY: Va. Code Ann. § 20-88 imposes a statutory obligation on children to assist in providing support and maintenance of their needy or destitute parents if the children are financially able to do so after reasonably providing for their own immediate families. In addition to authorizing the court to determine and order payment of support from children who are jointly and severally liable, the statute provides misdemeanor sanctions for the violation of an order entered for such support. On the issue of destitution, see *Kum Ja Kim v. Sportswear, 10 Va. App. 460, 469, 393 S.E.2d 418, 423 (1990).*

PRACTICE POINTER:

Although the juvenile and domestic relations court has exclusive original jurisdiction over these matters, the defendant does have the right to a jury trial in circuit court on a trial de novo appeal.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Family Offenses"

MICHIE'S JURISPRUDENCE, Parent and Child §§ 23, 24

CHAPTER 40

OBSCENITY

Scope Note

Instruction No. 40.100 Obscene—Definition

Instruction No. 40.200 Possession of Obscene Item With Intent to Sell

Instruction No. P40.200 Possession of Obscene Item With Intent to Sell

Instruction No. 40.300 Presentation of Obscene Motion Picture

Instruction No. P40.300 Presentation of Obscene Motion Picture

Instruction No. 40.400 Indecent Exposure

Instruction No. P40.400 Indecent Exposure

SCOPE NOTE

Article 5 of Chapter 8 of Title 18.2 of the Code of Virginia covers obscenity and related offenses. These instructions define the term "obscene" and relate to those obscenity offenses considered to occur most frequently. However, Article 5 offenses related to child pornography, based on Va. Code Ann. §§ 18.2-374.1, 18.2-374.1:1, 18.2-374.3 and 18.2-374.4, are not covered in this Chapter. See Chapter 29, Family Offenses and Crimes Against Children.

Instruction No. 40.100 defines "obscene." It is based on Va. Code Ann. § 18.2-372, which in turn follows the guidelines set down by the United States Supreme Court of the United States in *Miller v. California*, 413 U.S. 15 (1973). Other definitions appear in Article 5 but are not included in the instructions. Specifically, Va. Code Ann. § 18.2-373 enumerates obscene items; Va. Code Ann. § 18.2-374 includes a definition of "distribute;" and Va. Code Ann. § 18.2-375 describes "exhibitions or performances."

Instruction No. 40.200, "Possession of Obscene Item with Intent to Sell," is based on Va. Code Ann. § 18.2-374. It covers what is considered to be the most commonly occurring offense within that section, possession of obscene items with intent to sell. It is intended to be a model in drawing instructions for other Va. Code Ann. § 18.2-374 offenses: preparing, printing, copying, manufacturing, producing or reproducing an obscene item with intent to sell or distribute it; publishing, selling, renting, lending, transporting in intrastate commerce, distributing or exhibiting an obscene item, or offering to do so; and possessing an obscene item with intent to rent, lend, transport or distribute it.

Instruction No. 40.300, "Presentation of an Obscene Motion Picture," is based on Va. Code Ann. § 18.2-375. It too covers the most commonly occurring offense in that section and is intended to be a model for other Va. Code Ann. § 18.2-375 offenses: producing, promoting, preparing, managing, directing or participating in an obscene exhibition or performance; and owning, leasing, or managing a theater or other place, and leasing, lending, or permitting it to be used to present an obscene performance, or failing to post the name and address of a person managing the theater.

Instruction No. 40.400, "Indecent Exposure," is based on Va. Code Ann. § 18.2-387. As mentioned in the Alerts to that instruction, indecent exposure to children under fourteen (14) years old with lascivious intent is a separate and more serious offense, covered by Instruction No. 29.300, *Taking Indecent Liberties With Children—Indecent Exposure With Lascivious Intent.*

Separate instructions have not been included for the following Article 5 offenses: advertising an obscene item or exhibition (Va. Code Ann. § 18.2-376); using a computer in connection with a violation of §§18.2-374, 18.2-375 or 18.2-376 (Va. Code Ann. § 18.2-376.1); printing or displaying of obscene posters or pictures (Va. Code Ann. § 18.2-377); coercing acceptance of obscene articles or publications (Va. Code Ann. § 18.2-378); employing or permitting a minor to assist in an obscenity offense (Va. Code Ann. § 18.2-379); photography, modeling, and acting (Va. Code Ann. § 18.2-382); motion picture trailers or previews (Va. Code Ann. § 18.2-386); filming of nude or partially clad nonconsenting persons in private rooms, or of a person's intimate parts or undergarments not otherwise visible to the general public (Va. Code Ann. § 18.2-386.1, see also *Wilson v. Commonwealth, 53 Va. App. 599, 673 S.E.2d 923 (2009)*); and profane swearing and drunkenness (Va. Code Ann. § 18.2-388). Instruction Nos. 40.200, 40.300, and 40.400 may be used as models, however, for drafting instructions for these offenses.

For the purpose of serving as general models, the punishment instructions that follow employ a Class 1 misdemeanor disposition. Those instructions will need to be modified in some cases. Punishment instructions for first violations of Va. Code Ann. §§ 18.2-373 through 18.2-379, and for violations of Va. Code Ann. §§ 18.2-386 and 18.2-387, should retain the Class 1 misdemeanor disposition provisions shown. Instructions for second or subsequent violations of Va. Code Ann. §§ 18.2-374, 18.2-375, 18.2-376, 18.2-377, 18.2-378 or 18.2-379 should reflect Class 6 felony dispositions. See Alerts to Instruction Nos. 40.200 and 40.300, and Va. Code Ann. §§ 18.2-380 and 18.2-381. Punishment instructions for violations of Va. Code Ann. § 18.2-382 should reflect Class 3 misdemeanor punishments, while instructions for violations of Va. Code Ann. § 18.2-388 should reflect Class 4 misdemeanor dispositions.

Instruction No. 40.100

Obscene—Definition

An item is obscene when, considered as a whole:

(1) Applying local community standards, it has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters; and

(2) A reasonable person would not find that the item has any serious literary, artistic, political, or scientific value.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-372.

CASE AUTHORITY:

Moter v. Commonwealth, 61 Va. App. 471, 478–80, 737 S.E.2d 538, 541–42 (2013); Barson v. Commonwealth, 284 Va. 67, 72-74, 726 S.E.2d 292, 294-96 (2012); Allman v. Commonwealth, 43 Va. App. 104, 109–10, 596 S.E.2d 531, 534 (2004); Lofgren v. Commonwealth, 55 Va. App. 116, 119–22, 684 S.E.2d 223, 225–26 (2009); Ashcroft v. ACLU, 535 U.S. 564, 574 (2002); Pope v. Illinois, 481 U.S. 497, 500–01 (1987); Price v. Commonwealth, 214 Va. 490, 491–94, 201 S.E.2d 798, 799-801 (1974), vacated on other grounds, 419 U.S. 902 (1974); Miller v. California, 413 U.S. 15, 24 (1973); Price v. Commonwealth, 213 Va. 113, 115, 189 S.E.2d 324, 326 (1972); House v. Commonwealth, 210 Va. 121, 125–26, 169 S.E.2d 572, 575–76 (1969).

PRACTICE COMMENTARY: The instruction is based on Va. Code Ann. § 18.2-372, which in turn follows the guidelines set down by the United States Supreme Court in *Miller, 413 U.S. 15. Barson, 284 Va. at 72, 726 S.E.2d at 295* states that the definition of "obscene" in this instruction satisfies the constitutional requirements of *Miller*. The *Miller* guidelines were applied in *Price, 214 Va. at 491, 201 S.E.2d at 799*, in which the Court approved its earlier holding after remand from the Supreme Court of the United States (see *Price, 213 Va. at 113, 189 S.E.2d at 324*), that the standard in issue is that of the local community, rather than that of a national or statewide community. However, the Supreme Court of the United States held in *Pope, 481 U.S. 497 at 500–01*, that the jury should not be instructed to apply community standards in deciding the value question, but rather should be instructed to inquire whether a reasonable person would find serious value in the material, taken as a whole.

The determination that an item is obscene is not merely a matter of factual determination by a jury, but inasmuch as it is an issue of constitutional law, it is the ultimate decision of the court. It cannot be assumed that jurors themselves necessarily reflect community standards, and to sanction convictions without expert evidence of community standards encourages the jury to find obscene such conduct or material as is personally offensive to them. *House, 210 Va. at 126, 169 S.E.2d at 576*. But see *Freeman v. Commonwealth, 223 Va. 301, 316, 288 S.E.2d 461, 469 (1982)* (quoting *Kaplan v. California, 413 U.S. 115, 121 (1973)*) ("But there is no 'constitutional need for expert testimony. . . or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence.' "). Expert testimony regarding community standards is not required; the fact finder may apply his knowledge in ascertaining the acceptable standard in the community. *Allman v. Commonwealth,43 Va. App. at 110, 596 S.E.2d at 534.*

This definition of obscenity has been used in statutes outside of Article 5, Chapter 8 ("Crimes Involving Morals and Decency") of Title 18.2. See, *e.g.*,

Barson, 284 Va. at 72, 726 S.E.2d at 295.

ALERTS:

• The production, publication, sale, and financing of child pornography is governed by Va. Code Ann. § 18.2-374.1. The possession, reproduction, distribution, solicitation, and facilitation of child pornography is governed by Va. Code Ann. § 18.2-374.1:1. See Chapter 29, Family Offenses and Crimes Against Children. Va. Code Ann. § 18.2-374.1 was upheld as constitutional in *Freeman, 223 Va. at 313, 288 S.E.2d at 467*, in which the court also held that material may be obscene for children, but not necessarily obscene for adults.

• The permissible "unit of prosecution" for possession of child pornography under Va. Code Ann. § 18.2-374.1(B)(4) corresponds to the number of individual items of sexually explicit visual material. *Mason v. Commonwealth, 49 Va. App. 39, 48, 636 S.E.2d 480, 484 (2006).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 54.1–54.6

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11; Constitutional Law § 78; Infants and Juveniles § 89; Photographs and Photographers § 4; Sodomy §§ 1–4; and Theaters, Shows and Fairs § 2

Instruction No. 40.200

Possession of Obscene Item With Intent to Sell

The defendant is charged with the crime of unlawfully possessing an obscene item with the intent to sell it. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the item was obscene; and

(2) That the defendant possessed it;

(3) With knowledge of its content and character; and

(4) With the intent to sell it.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P40.200

Possession of Obscene Item With Intent to Sell

You have found the defendant guilty of the crime of possession of obscene item with intent to sell.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-373, 18.2-374, 18.2-380, 18.2-381.

CASE AUTHORITY:

Kobman v. Commonwealth, 65 Va. App. 304, 307–11, 777 S.E.2d 565, 567–69 (2015); *Terlecki v. Commonwealth, 65 Va. App. 13, 19-26, 772 S.E.2d 777, 780–84 (2015)*; *Toro v. Norfolk, 14 Va. App. 244, 246–47, 416 S.E.2d 29, 30 (1992)*; *Wall Distributors, Inc. v. City of Newport News, 228 Va. 358, 361–62, 323 S.E.2d 75, 76–77 (1984)*; *House v. Commonwealth, 210 Va. 121, 124, 169 S.E.2d 572, 575 (1969)*.

PRACTICE COMMENTARY: This instruction may be used as a model for the other offenses listed in Va. Code Ann. § 18.2-374, for which individual instructions do not appear. See Va. Code Ann. § 18.2-373 for an enumeration of obscene items. See Instruction No. 29.400, "Production, etc., of Child Pornography" for a model instruction on child pornography, based on Va. Code Ann. § 18.2-374.1.

Since Va. Code Ann. § 18.2-374 punishes "knowing" distribution, the Commonwealth must prove that the items were obscene and that the defendant knew they were obscene when he distributed them to retail dealers. *House, 210 Va. at 124, 169 S.E.2d at 575*, *Wall Distributors, 228 Va. at 361, 323 S.E.2d at 76*. The term "knowing" does not require the Commonwealth to prove that the defendant knew the legal status of the materials. *Hamling v. United States, 418 U.S. 87, 123 (1974)*. Proof that the defendant had knowledge of the nature, character, and content of the material is sufficient. See *Wall Distributors, 228 Va. at 361, 323 S.E.2d at 76* (referring to the decision of the Supreme Court of the United States in *Hamling*).

For the offense of displaying material harmful to children, see *Commonwealth v. American Booksellers Ass'n, 236 Va. 168, 178–79, 372 S.E.2d 618, 624–25 (1988)*, holding that proof that juveniles have actually taken advantage of the opportunity to examine the material is not required but only that the store owner did not take reasonable efforts to prevent perusal by juveniles of harmful material permitted to be displayed. See also *American Booksellers Ass'n v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989)* (rejecting the argument that the Code provisions as interpreted by the Virginia Supreme Court in *American Booksellers, 236 Va. 168, 372 S.E.2d 618*, were unconstitutionally vague).

ALERTS:

• The punishment provision utilized in the instruction is for a first obscenity offense conviction, which is a Class 1 misdemeanor. Va. Code Ann. § 18.2-380. If the defendant is convicted of "a second or other subsequent" obscenity offense, he is guilty of a Class 6 felony. In such circumstances, the punishment instruction should be modified in accord with the provisions of Va. Code Ann. § 18.2-381 as follows:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

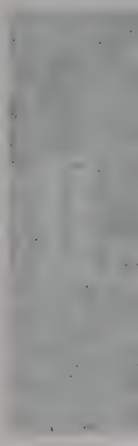
• Va. Code Ann. § 18.2-381 also provides that "if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than $10,000 shall be imposed *in addition to the penalties otherwise prescribed by this section.*" (emphasis added).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 54.1–54.6

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11; Constitutional Law § 78; Infants and Juveniles § 89; Photographs and Photographers § 4; Sodomy §§ 1–4; and Theaters, Shows and Fairs § 2



Instruction No. 40.300

Presentation of Obscene Motion Picture

The defendant is charged with the crime of unlawfully presenting an obscene motion picture. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the motion picture was obscene; and

(2) That the defendant presented it; and

(3) The defendant knew its content and character; and

(4) That at the time, the defendant was the manager, or an officer of, or had a financial interest in, the theater

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P40.300

Presentation of Obscene Motion Picture

You have found the defendant guilty of the crime of presentation of obscene motion picture.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-375, 18.2-380, 18.2-381.

CASE AUTHORITY:

Price v. Commonwealth, 214 Va. 490, 491, 201 S.E.2d 798, 799 (1974), vacated on other grounds, 413 U.S. 912 (1973); Grove Press, Inc. v. Evans, 306 F. Supp. 1084, 1087–88 (E.D. Va. 1969).

PRACTICE COMMENTARY: This instruction may be used as a model for the other offenses listed in Va. Code Ann. § 18.2-375, for which individual instructions do not appear. Va. Code Ann. Section 18.2-375 is constitutional, and not vague or overbroad. *Price, 214 Va. at 493–494, 201 S.E.2d at 800–01.*

Employees who are not managers or officers and who have no financial interest in the theater other than receiving salary and wages are not subject to prosecution under Va. Code Ann. § 18.2-375.

Va. Code Ann. Section 18.2-375 has been held to limit the class of works which might be found obscene to depictions of sexual activity or excretion, not including mere nudity. See *Price, 214 Va. at 493, 201 S.E.2d at 800.*

PRACTICE POINTER:

Va. Code Ann. Section 18.2-375 requires a knowing violation, but the Commonwealth need only show that the defendant exhibited the film knowing its content. *Price, 214 Va. at 493–94, 201 S.E.2d at 800–01.*

ALERTS:

• The punishment indicated in the instruction is for a first obscenity offense conviction, which is a Class 1 misdemeanor.

• If the defendant is convicted of a second or other subsequent obscenity offense, Instruction No. P40.300 should be modified as shown in the Alerts for Instruction No. 40.200, "Possession of Obscene Item With Intent to Sell."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 54.1–54.6

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11; Constitutional Law § 78; Infants and Juveniles § 89; Photographs and Photographers § 4; Sodomy §§ 1–4; and Theaters, Shows and Fairs § 2

Instruction No. 40.400

Indecent Exposure

The defendant is charged with the crime of indecent exposure. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intentionally made an obscene exposure of his private parts; and

(2) That the act was done in [in a public place; a place where others were present]

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P40.400

Indecent Exposure

You have found the defendant guilty of the crime of indecent exposure.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-387.

CASE AUTHORITY:

Barnes *v. Commonwealth, 61 Va. App. 495, 498–501, 737 S.E.2d 919, 921–22 (2013); Moses v. Commonwealth, 45 Va. App. 357, 362–64, 611 S.E.2d 607, 609–11 (2005); Morales v. Commonwealth, 31 Va. App. 541, 543–44, 525 S.E.2d 23, 24 (2000); Hart v. Commonwealth, 18 Va. App. 77, 79–80, 441 S.E.2d 706, 707–08 (1994).*

PRACTICE COMMENTARY: None.

PRACTICE POINTER:

A defendant who intentionally and obscenely engages in actual or explicitly simulated acts of masturbation in a public place where others are present, and with the intent to be seen by others, is guilty of a Class 1 misdemeanor under Va. Code Ann. § 18.2-387.1.

The term " 'public place,' as used in Va. Code Ann. §§ 18.2-387 and 18.2-387.1 comprises places and circumstances where the offender does not have a reasonable expectation of privacy, because of the foreseeability of a non-consenting public witness." *Barnes, 61 Va. App. at 500, 737 S.E.2d at 921.* In *Barnes*, the defendant was in a public place as he stood by the bars of his cell in the first floor lockup, where he was in "open view to staff, other inmates, and to members of the public with authorized access." *Id. at 500, 737 S.E.2d at 922.*

ALERTS:

• A third conviction of indecent exposure may be punished as a Class 6 felony. See Va. Code Ann. § 18.2-67.5:1.

• Indecent exposure is not a lesser included offense of exposure with lascivious intent to children under the age of 15, in violation of Va. Code Ann. § 18.2-370. *Simon v. Commonwealth, 58 Va. App. 194, 204–05, 708 S.E.2d 245, 250 (2011).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Pornography" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 54.1–54.6

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 11; Constitutional Law § 78; Infants and Juveniles § 89; Photographs and Photographers § 4; Sodomy §§ 1–4; and Theaters, Shows and Fairs § 2

CHAPTER 41

PERJURY

Scope Note

Instruction No. 41.100 Perjury—General

Instruction No. P41.100 Perjury—General

Instruction No. 41.200 Perjury—Evidence to Convict

Instruction No. 41.300 Perjury—Knowingly and Willfully

Instruction No. 41.400 Perjury—Materiality

Instruction No. 41.500 Perjury—Differing Testimony by Defendant on Separate Occasions

Instruction No. P41.500 Perjury—Differing Testimony by Defendant on Separate Occasions

Instruction No. 41.600 Perjury—Procuring Another to Give False Testimony Subornation of Perjury

Instruction No. P41.600 Perjury—Procuring Another to Give False Testimony Subornation of Perjury

SCOPE NOTE

Perjury is a statutory crime made a Class 5 felony by Va. Code Ann. § 18.2-434.

Va. Code Ann. § 18.2-434 sets out the elements of common law perjury while Va. Code Ann. § 18.2-435 provides that knowingly giving conflicting testimony on a material matter or thing on separate occasions with the intent to testify falsely "shall likewise constitute perjury."

Va. Code Ann. § 18.2-436 covers inducing another to commit perjury or to give false testimony and makes such act punishable as in Va. Code Ann. § 18.2-434.

The following instructions cover each of these sections, omitting only a provision in Va. Code Ann. § 18.2-434 proscribing as perjury the false making of an oath that any other person is 18 years of age in order to obtain a marriage license for such other person. This would not appear to require a special instruction. If deemed necessary, however, Instruction No. 41.100 could be adapted easily to cover that case.

Va. Code Ann. § 18.2-437 is an immunity provision applicable to witnesses for the prosecution; it is comparable to those immunity statutes relating to bribery prosecutions in Va. Code Ann. §§ 18.2-445 and 18.2-450. It does not expressly refer to grand jury proceedings, however, as do the latter two sections.

See also Va. Code Ann. § 19.2-161; *Henry v. Commonwealth, 63 Va. App. 30, 44, 753 S.E.2d 868, 874 (2014)*; *Smith v. Commonwealth, 12 Va. App. 606, 607–08, 405 S.E.2d 626, 627 (1991)* (swearing falsely in executing a statement of indigency for appointment of counsel).

Instruction No. 41.100

Perjury—General

The defendant is charged with the crime of perjury. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant made a [false statement under oath; false written statement under penalty of perjury]; **and**

(2) That the defendant did so knowingly and willfully; and

(3) That such statement was material to any issue then being [tried; heard].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P41.100

Perjury—General

You have found the defendant guilty of the crime of perjury.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-434, 8.01-4.3.

CASE AUTHORITY:

Gerald v. Commonwealth, 295 Va. 469, 479–82, 813 S.E.2d 722, 727–29 (2018); *Sutphin v. Commonwealth, 61 Va. App. 315, 321–22, 734 S.E.2d 725, 728 (2012)*; *Fritter v. Commonwealth, 45 Va. App. 345, 352–56, 610 S.E.2d 887, 890–92 (2005)*; *Angelone v. Dabney, 263 Va. 323, 327–328, 560 S.E.2d 253, 255–56 (2002)*; *Sheard v. Commonwealth, 12 Va. App. 227, 232–33, 403 S.E.2d 178 (1991)*; *Williams v. Commonwealth, 8 Va. App. 336, 339–41, 381 S.E.2d 361, 363–64 (1989)*; *Holz v. Commonwealth, 220 Va. 876, 880–82, 263 S.E.2d 426, 428–29 (1980)*; *Mendez v. Commonwealth, 220 Va. 97, 102–03, 255 S.E.2d 533, 535–36 (1979)*; *Rothfuss v. Commonwealth, 198 Va. 461, 466–68, 94 S.E.2d 532, 535–37 (1956)*; *Fitch v. Commonwealth, 92 Va. 824, 827–36, 24 S.E. 272, 273–75 (1896)*; *Commonwealth v. Calvert, 3 Va. (1 Va. Cas.) 265, 265–67 (1812)*.

PRACTICE COMMENTARY: In a prosecution under Va. Code Ann. § 18.2-434, mere proof that contradictory statements were given by the accused under oath has been deemed insufficient to sustain a perjury conviction on the theory that it is necessary for the Commonwealth to prove which of the two statements is false. *Smyth v. Godwin, 188 Va. 753, 770, 51 S.E.2d 230, 238 (1949)*. But see Va. Code Ann. § 18.2-435 and Instruction No. 41.500 Perjury—Differing Testimony by Defendant on Separate Occasions.

Va. Code Ann. § 18.2-434 requires that the oath be "lawfully administered." For a case where the oath given was outside the jurisdiction of the court and, therefore, unlawful, see *Calvert, 3 Va. at 265–67*.

After acquittal on the original substantive charge, the doctrine of collateral estoppel could, but does not necessarily, preclude a subsequent prosecution for perjury in violation of Va. Code Ann. § 18.2-434 for the acquittee's testimony at the earlier trial. *Midgette v. Commonwealth, 69 Va. App. 362, 371–75, 819 S.E.2d 840, 845–47 (2018)*; *Pijor v. Commonwealth, 294 Va. 502, 513–16, 808 S.E.2d 408, 414–15 (2017)*.

PRACTICE POINTER:

For definitions instructions concerning key terms used in this instruction, see Instruction No. 41.300 with regard to "knowingly and willfully," and Instruction No. 41.400 with regard to "material."

The elements of the general perjury statute, Va. Code Ann. § 18.2-434, do not define the elements of the crime of making a false application for welfare. The elements of the crime of making a false application for welfare are a specific form of perjury defined under Va. Code Ann. § 63.2-502. *Burrell v. Commonwealth, 50*

Va. App. 72, 81, 646 S.E.2d 35, 40 (2007).

ALERTS:

• See Instruction No. 41.200 and accompanying *Practice Commentary* with regard to the necessity for at least two witnesses in establishing proof of perjury or corroborating evidence of a single witness's testimony.

• This instruction is not to be confused with Instruction No. 41.500 concerning the separate and distinct offense of perjury arising as a result of differing testimony by the defendant on separate occasions.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury § 1–11

Instruction No. 41.200

Perjury—Evidence to Convict

The falsity of a [statement under oath; written statement under penalty of perjury] **must be established by two or more witnesses, or by one witness whose testimony is corroborated by circumstances inconsistent with innocence of the defendant and directly tending to support the testimony of the accusing witness.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Cossitt-Manica v. Commonwealth, 65 Va. App. 394, 400–06, 778 S.E.2d 513, 516–19 (2015); *Sutphin v. Commonwealth, 61 Va. App. 315, 321–22, 734 S.E.2d 725, 728 (2012)*; *Fritter v. Commonwealth, 45 Va. App. 345, 353–55, 610 S.E.2d 887, 891–92 (2005)*; *Donati v. Commonwealth, 37 Va. App. 575, 579, 560 S.E.2d 455, 457 (2002)*; *Stewart v. Commonwealth, 22 Va. App. 117, 120, 468 S.E.2d 126, 127 (1996)*; *Keffer v. Commonwealth, 12 Va. App. 545, 547–49, 404 S.E.2d 745, 746–47 (1991)*; *Mundy v. Commonwealth, 161 Va. 1049, 1070–71, 171 S.E. 691, 698 (1933)*; *Schwartz v. Commonwealth, 68 Va. (27 Gratt.) 1025, 1027–28 (1876)*.

PRACTICE COMMENTARY: The above instruction was derived from the language of *Schwartz, 68 Va. (27 Gratt.) at 1027*.

The one-witness-plus-corroboration principle does not apply in cases where competent, authenticated, real evidence, consisting of a videotape and photographs, demonstrates the falsity of the defendant's sworn statements. *Donati, 37 Va. App. at 578–79, 560 S.E.2d at 456–57*.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury §§ 1–11

Instruction No. 41.300

Perjury—Knowingly and Willfully

In order to find that the defendant made a false statement knowingly and willfully, you must find that the defendant knew, at the time he made the statement, that it was false.

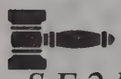
SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

***CASE AUTHORITY*:**

Angelone v. Dabney, 263 Va. 323, 327, 560 S.E. 2d 253, 255–56 (2002); *Waldrop v. Commonwealth, 255 Va. 210, 215, 495 S.E.2d 822, 825 (1998)*; *Holz v. Commonwealth, 220 Va. 876, 880–81, 263 S.E.2d 426, 428–29 (1980)*; *Rothfuss v. Commonwealth, 198 Va. 461, 466, 94 S.E.2d 532, 535 (1956).*



PRACTICE COMMENTARY: As stated in *Rothfuss, 198 Va. at 466, 94 S.E.2d at 535*, "[t]he burden [is] on the Commonwealth to prove beyond a reasonable doubt not only that the statements the accused made under oath were false, but were known by him to be false at the time."

***ALERTS*:**

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Crag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury §§ 1–11

Instruction No. 41.400

Perjury—Materiality

For a statement to be material to any issue being [tried; heard] **the statement must be one which is relevant to the fact then being** [tried; heard] **or to any substantial circumstance which tends to prove or disprove such fact.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Fritter v. Commonwealth, 45 Va. App. 345, 352–53, 610 S.E.2d 887, 890–91 (2005); Ganzie v. Commonwealth, 24 Va. App. 422, 429–30, 482 S.E.2d 863, 867 (1997); Sheard v. Commonwealth, 12 Va. App. 227, 232, 403 S.E.2d 178, 180–81 (1991); Holz v. Commonwealth, 220 Va. 876, 881, 263 S.E.2d 426, 429 (1980).

PRACTICE COMMENTARY: A false statement is sufficient to support a charge of perjury if it is relevant to any material subject of inquiry. Generally, this includes the primary issue of a trial as well as any collateral issues. *Holz, 220 Va. at 881, 263 S.E.2d at 429.*

In *Rhodes v. Commonwealth, 78 Va. (3 Hansb.) 692 (1884)*, a false statement under oath about the date of an alleged larceny was deemed immaterial to the allegation of larceny because that was not the question at issue. Especially since it was not proven that the larceny had not been committed, the contradictory testimony was held insufficient to support a conviction for perjury. The oath must be "material to the question depending; for if it does not tend to aggravate, nor extenuate, the damages, [and it is] no[t] likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury." *Id. at 699.*

The Supreme Court held in *Crump v. Commonwealth, 75 Va. (1 Matt.) 922, 924 (1882)*, that a false statement under oath denying execution of the written waiver of an exemption which under law could not be waived did not constitute perjury because it was immaterial.

☞ ***PRACTICE POINTER:***

Separate material false statements support separate convictions even though given in the course of a single witness's appearance. *Ganzie, 24 Va. App. at 428, 482 S.E.2d at 866.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Crag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury §§ 1–11

Instruction No. 41.500

Perjury—Differing Testimony by Defendant on Separate Occasions

The defendant is charged with the crime of perjury. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant knowingly testified under oath as to a material matter; and

(2) That subsequently, under oath, the defendant knowingly gave differing testimony as to the same material matter; and

(3) That such differing testimony on one of the occasions was given with the intent to testify falsely.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P41.500

Perjury—Differing Testimony by Defendant on Separate Occasions

You have found the defendant guilty of the crime of perjury.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-435, 18.2-434.

CASE AUTHORITY:

Sutphin v. Commonwealth, 61 Va. App. 315, 320–22, 734 S.E.2d 725, 727–28 (2012); Angelone v. Dabney, 263 Va. 323, 327, 560 S.E.2d 253, 255–56 (2002); Scott v. Commonwealth, 14 Va. App. 294, 296–99, 416 S.E.2d 47, 48–50 (1992); Williams v. Commonwealth, 8 Va. App. 336, 339–41, 381 S.E.2d 361, 363–64 (1989).

PRACTICE COMMENTARY: The Court of Appeals' decision in *Scott, 14 Va. App. at 298–299, 416 S.E.2d at 49–50*, defines the phrase "give testimony" as used in Va. Code Ann. § 18.2-435.

ALERTS:

• This instruction is not to be confused with Instruction No. 41.100, which pertains to a separate and distinct offense.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury §§ 1–11

Instruction No. 41.600

Perjury—Procuring Another to Give False Testimony Subornation of Perjury

The defendant is charged with the crime of procuring another to give false testimony. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [procured; induced; counseled; advised] **another person to give false testimony under oath; and**

(2) That the other person, in fact, gave false testimony under oath.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable
not guilty.

Instruction No. P41.600

Perjury—Procuring Another to Give False Testimony Subornation of Perjury

You have found the defendant guilty of the crime of procuring another to give false testimony.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-436.

CASE AUTHORITY:

Mundy v. Commonwealth, 161 Va. 1049, 1059–63, 171 S.E. 691, 694–96 (1933).

PRACTICE COMMENTARY: While this crime is the act of an accessory, the Code treats perjury and subornation of perjury as separate and distinct offenses. Hence, the suborner of perjury may be tried and convicted before the conviction of the perjurer. *Mundy, 161 Va. at 1061–62, 171 S.E.2d at 694–95.*

ALERTS:

• The uncorroborated testimony of the perjurer is sufficient to establish the element of suborning. However, if it is uncorroborated, an accomplice testimony cautionary instruction should be given. *Mundy, 161 Va. at 1069, 171 S.E.2d at 698. See* Instruction No. 3.400.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Perjury"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 23.1–23.4

MICHIE'S JURISPRUDENCE, Perjury §§ 1–11

CHAPTER 42

ESCAPE AND PRISONER-RELATED CRIMES

Scope Note

Instruction No. 42.100 Escape—General

Instruction No. P42.100 Escape—General

Instruction No. 42.110 Escape—General (Felon)

Instruction No. P42.110 Escape—General (Felon)

Instruction No. 42.120 Escape from Custody By Force or Violence

Instruction No. P42.120 Escape from Custody By Force or Violence

Instruction No. 42.140 Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation)

Instruction No. P42.140 Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation)

Instruction No. 42.150 Escape—Without Force or Violence (Charged With or Convicted of Felony)

Instruction No. P42.150 Escape—Without Force or Violence (Charged With or Convicted of Felony)

Instruction No. 42.160 Escape—Furlough

Instruction No. P42.160 Escape—Furlough (Felony)

Instruction No. 42.170 Escape—Work Release (State Prisoner)

Instruction No. P42.170 Escape—Work Release (State Prisoner) (Felony)

Instruction No. 42.180 Escape—Work Release (Jail Inmate)

Instruction No. P42.180(a) Escape—Work Release (Jail Inmate) (Felony)

Instruction No. P42.180(b) Escape—Work Release (Jail Inmate) (Misdemeanor)

Instruction No. 42.200 Escape—Aiding (Felony)

Instruction No. P42.200 Escape—Aiding (Felony)

Instruction No. 42.220 Escape—Aiding (Misdemeanor)

Instruction No. P42.220 Escape—Aiding (Misdemeanor)

Instruction No. 42.240 Escape—Voluntarily Allowing Person Charged with Felony or Felon to Escape

Instruction No. P42.240 Escape—Voluntarily Allowing Person Charged with Felony or Felon to Escape

Instruction No. 42.300 Contraband—Delivery of Marijuana or Controlled Drug to Prisoner

Instruction No. P42.300 Contraband—Delivery of Marijuana or Controlled Drug to Prisoner

Instruction No. 42.320 Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner

Instruction No. P42.320 Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner

Instruction No. 42.400 Contraband—Possession of Firearm or Firearm Ammunition by Prisoner

Instruction No. P42.400 Contraband—Possession of Firearm or Firearm Ammunition by Prisoner

Instruction No. 42.500 Prisoner—Injuries to Non-Prisoner

Instruction No. P42.500 Prisoner—Injuries to Non-Prisoner

Instruction No. 42.520 Probationer (Parolee)—Injuries to Probation (Parole) Officer

Instruction No. P42.520 Probationer (Parolee)—Injuries to Probation (Parole) Officer

SCOPE NOTE

The following instructions relate to escape by, possession of contraband by, or delivery of contraband to, prisoners and crimes by prisoners.

Definitions of key terms in prisoner-related crimes e.g., "state correctional facility," are found in Va. Code Ann. § 53.1-1.

The legality of the prisoner's detention is not a jury issue. Detention is lawful even if a prisoner is later acquitted or freed upon appeal or habeas corpus, if the commitment is by authority or command of law. *Tann v. Commonwealth, 190 Va. 154, 159–60, 56 S.E.2d 47, 49 (1949).* Any issue of lawful custody is a matter of law for the court to determine.

"Escape" is not defined by any Virginia statute. The Model Penal Code § 242.6, defines escape in terms of unlawful removal from detention. The instructions pertaining to escape adopt this definition.

Escape Generally. Five instructions cover the statutes applicable to escape other than while on furlough or work release. Instructions No. 42.100 and 42.110 are based on Va. Code Ann. § 53.1-203(1), which can be applied to any escape by any prisoner and carries a felony penalty, even though the same act could be treated as a misdemeanor under Va. Code Ann. § 18.2-479(A).

Va. Code Ann. § 18.2-477 deals with escape by force and violence, other than by setting fire, and applies to a person in jail or custody after conviction. The offense is a Class 6 felony. Under Va. Code Ann. § 18.2-477, the term of confinement for escape begins upon the expiration of the former sentence. There is no instruction for this statute.

Instruction No. 42.120 is based on Va. Code Ann. § 18.2-478, which covers escape by force and violence, other than by setting fire, of a person in the custody of a police officer on a criminal charge. The offense is a Class 6 felony.

Instructions No. 42.140 and 42.150 are based on Va. Code Ann. § 18.2-479, and apply to escape without force or violence or setting fire to a jail by a person lawfully confined in jail or lawfully in custody. It can be charged as either a Class 1 misdemeanor or Class 6 felony depending on the circumstances. Under Va. Code Ann. § 18.2-479(A), if the person is confined or in custody on a charge or conviction of a misdemeanor, the offense is a Class 1 misdemeanor. See Instruction No. 42.140. Under Va. Code Ann. § 18.2-479(B), if the person is confined or in custody on a charge or conviction of a felony, the offense is a Class 6 felony. See Instruction No. 42.150.

Where an escape is accomplished by setting fire to a jail, Va. Code Ann. § 18.2-480 makes the penalty a Class 4 felony. No instruction is provided because of the simplicity of the statute and its limitation to escape from jail. Also, arson statutes, especially Va. Code Ann. § 18.2-77, are applicable. See Chapter 7, *Arson.*

Escape While on Furlough. Instruction No. 42.160 is based on Va. Code Ann. § 53.1-37 and applies to a state prisoner on furlough. Willful failure to remain within furlough limits, or willful failure to return, is punished as an escape. Willful failure of a prisoner sentenced to confinement in a local correctional facility to remain within furlough limits or to return is a Class 1 misdemeanor. Va. Code Ann. § 53.1-132. However, when a prisoner has been released without supervision (to attend a funeral) and fails to return to the local correctional facility at the designated time, he is not in violation of Va. Code Ann. § 53.1-203(1). *Simmons v. Common-*

wealth, 16 Va. App. 621, 431 S.E.2d 335 (1993).

Escape While on a Work Release Program. Two instructions cover escape while on a work release program. Instruction No. 42.170 applies to work release programs for state prisoners, and is based on Va. Code Ann. § 53.1-60. Pursuant to Va. Code Ann. § 53.1-60(D), leaving the assigned work area or the vehicle or route involved in traveling to or from the work area, without proper authority or just cause, is punished as an escape under Va. Code Ann. § 18.2-477; however, if there are mitigating circumstances or the culpability of the state prisoner is minimal, the offense may be punished as a Class 2 misdemeanor. Instruction No. 42.180 applies to work release programs for prisoners sentenced to local correctional facilities, and is based on Va. Code Ann. § 53.1-131. Under Va. Code Ann. § 53.1-131(A), leaving the assigned work area or the vehicle or route involved in traveling to or from the work area is a Class 1 misdemeanor unless the offender leaves the Commonwealth, in which case the escape punishment provision of Va. Code Ann. § 18.2-477 applies.

Aiding a Prisoner. Instructions No. 42.200 and 42.220 apply to aiding the escape of a prisoner, and are based on Va. Code Ann. § 18.2-473. The crime may be either a felony or a misdemeanor, depending on the reason for the prisoner's detention and whether or not the escape was effectuated. Va. Code Ann. § 18.2-473 also prohibits aiding the escape of a child from certain facilities or from custody, and Va. Code Ann. § 18.2-477.1 deals with escape from a juvenile detention center; the instructions should be adapted to fit these scenarios where applicable.

Instruction No. 42.240 covers voluntarily allowing a felon to escape, a Class 4 felony under Va. Code Ann. § 18.2-475. Willfully and deliberately allowing a misdemeanant to escape and willfully refusing to accept custody of a lawfully committed prisoner are Class 2 misdemeanors pursuant to Va. Code Ann. § 18.2-476; instructions are not provided for these offenses.

Instructions No. 42.300 and 42.320 apply to delivery of contraband to prisoners under Va. Code Ann. § 18.2-474.1. Instruction No. 42.300 relates to delivery of marijuana or controlled drugs—a Class 5 felony; Instruction No. 42.320 relates to delivery of firearms, ammunition, or explosives—a Class 3 felony.

Crimes by Prisoners in Custody. Possession of firearms or ammunition by a prisoner is governed by Va. Code Ann. § 53.1-203(7). Instruction No. 42.400 is a sample instruction for possession of a firearm and is intended to serve as a guide for drafting other instructions for possession of contraband.

No instruction is provided for delivery to or possession by a prisoner of a cellular telephone, a Class 6 felony under Va. Code Ann. § 18.2-431.1.

Instruction No. 42.500 deals with injuries inflicted by prisoners on non-prisoners, and is based on Va. Code Ann. § 18.2-55. Instruction No. 42.520 concerns injuries to probation and parole officers by persons under their supervision, an offense under Va. Code Ann. § 18.2-55.

In regard to any other crimes by prisoners, Va. Code Ann. § 53.1-204 provides that prisoners committing felonies other than those punished by Va. Code Ann. § 18.2-31 (capital murder), Va. Code Ann. § 18.2-55 (bodily injuries), and Va. Code Ann. § 53.1-203 (felonies by prisoners) shall be subject to the same sentencing scheme as any other person convicted of that felony.

Instruction No. 42.100

Escape—General

The defendant is charged with the crime of escape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [was a prisoner in (specify state, local, or community correctional facility as defined in Va. Code Ann. § 53.1-1); was in the custody of an employee of (specify state, local or community correctional facility as defined in Va. Code Ann. § 53.1-1)]**; and**

(2) **That the defendant escaped from** [that correctional facility; the custody of the person in charge of him]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.100

Escape—General

You have found the defendant guilty of the crime of escape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-203(1).

CASE AUTHORITY:

Simmons v. Commonwealth, 16 Va. App. 621, 623–24, 431 S.E.2d 335, 336–37 (1993); Mabe v. Commonwealth, 14 Va. App. 439, 441, 417 S.E.2d 899, 900 (1992).

PRACTICE COMMENTARY: This instruction is patterned on Va. Code Ann. § 53.1-203(1). For definitions of "state correctional facility," "local correctional facility," and "community correctional facility," see Va. Code Ann. § 53.1-1.

The first element of this Instruction applies to anyone who has the status of "prisoner in a correctional facility or in the custody of an employee thereof", and is not impacted by the particular circumstances of escape. However, the circumstances of escape are relevant to the second element. *Simmons, 16 Va. App. at 624, 431 S.E.2d at 336–37* (a prisoner's failure to return to the jail after being released on an unsupervised furlough does not constitute an escape from a correctional facility). See Instruction No. 42.160, Escape—Furlough.

PRACTICE POINTER:

For a discussion of custody, charges, and arrest, see *Hubbard v. Commonwealth, 276 Va. 292, 295–96, 661 S.E.2d 464, 466–64 (2008)*, and *Coles v. Commonwealth, 44 Va. App. 549, 553–62, 605 S.E.2d 784, 786–90 (2004)*. For a case dealing with conspiracy to commit escape under Va. Code Ann. § 53.1-203, see *Charity v. Commonwealth, 49 Va. App. 581, 586–87, 643 S.E.2d 503, 505–06 (2007)*.

ALERTS:

• If the defendant is a felon, see Instruction No. 42.110, Escape—General (Felon).

• The same act covered by this Instruction may also be charged as a Class 1 misdemeanor under Va. Code Ann. § 18.2-479(A). See Instruction No. 42.140, Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation).

• Once a prisoner is convicted of escape, his original sentence is interrupted, and he begins serving the escape sentence immediately. Va. Code Ann. § 53.1-203.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.110

Escape—General (Felon)

The defendant is charged with the crime of escape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was a felon;**

(2) **That the defendant** [was a prisoner in (specify state, local or community correctional facility as defined in Va. Code Ann. § 53.1-1); was in the custody of an employee of (specify state, local or community correctional facility as defined in Va. Code Ann. § 53.1-1)]**; and**

(3) **That the defendant escaped from** [that correctional facility; the custody of the person in charge of him]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.110

Escape—General (Felon)

You have found the defendant guilty of the crime of escape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-203(1).

CASE AUTHORITY:

Simmons v. Commonwealth, 16 Va. App. 621, 623–24, 431 S.E.2d 335, 336–37 (1993); *Mabe v. Commonwealth, 14 Va. App. 439, 441, 417 S.E.2d 899, 900 (1992).*

PRACTICE COMMENTARY:

None.

ALERTS:

• If the defendant is not a felon, see Instruction No. 42.100, Escape—General.

• The same act covered by this Instruction may also be charged as a Class 6 felony, without any mandatory minimum sentence, under Va. Code Ann. § 18.2-479(B). See Instruction No. 42.150, Escape—Without Force or Violence (Charged With or Convicted of Felony).

• A prisoner's failure to return to the jail after being released on an unsupervised furlough does not constitute an escape from a correctional facility. *Simmons, 16 Va. App. at 624, 431 S.E.2d at 336–37*, see Instruction No. 42.160, Escape—Furlough.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.120

Escape from Custody By Force or Violence

The defendant is charged with the crime of escape from custody by force or violence. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was in the lawful custody of a police officer;

(2) That the defendant was charged in writing with a criminal offense before he was taken into custody; and

(3) That he escaped [without lawful permission] **from custody by force or violence.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of the crime of escape from custody by force or violence.

Escape from Custody By Force or Violence

(3) That he escaped [without lawful permission] from custody by force or violence.

Instruction No. P42.120

Escape from Custody By Force or Violence

You have found the defendant guilty of the crime of escape from custody by force or violence.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

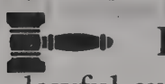
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-478.

CASE AUTHORITY:

Hall v. Commonwealth, 280 Va. 566, 570–71, 701 S.E.2d 68, 70–71 (2010); *Hubbard v. Commonwealth, 276 Va. 292, 295, 661 S.E.2d 464, 466 (2008)*; *Coles v. Commonwealth, 44 Va. App. 549, 553–62, 605 S.E.2d 784, 786–90 (2004)*; *Henry v. Commonwealth, 21 Va. App. 141, 146–48, 462 S.E.2d 578, 580–82 (1995)*.



PRACTICE COMMENTARY: This instruction covers only escape from lawful custody by force or violence. It does not cover escape from jail by force or violence, the other crime established in Va. Code Ann. § 18.2-478.

Custody: A defendant is in custody when

> the officer, with proper authority . . . had by his words or use of physical force, curtailed the individual's freedom of movement beyond that required for a temporary investigative detention. However, an individual under arrest is always in custody. . . . And, an arrest occurs when the officer actually restrains the individual or the individual submits to the authority of the officer.

Hall, 280 Va. at 570, 701 S.E.2d at 71. The term "custody" has the same meaning under Va. Code Ann. § 18.2-478 as it does in Va. Code Ann. § 18.2-479. *Hall, 280 Va. at 570 n.3, 701 S.E.2d at 71 n.3*.

A conviction under this section requires that the defendant be charged with a crime before he was taken into custody. "A criminal charge . . . exists only when a formal written complaint has been made against the accused and a prosecution initiated." *Hubbard, 276 Va. at 296, 661 S.E.2d at 467* (quoting *United States v. Patterson, 150 U.S. 65, 68 (1893)*).

> [T]he phrase 'on a charge of criminal offense,' clearly contemplates a formal accusation upon which a trial court could act and pass judgment. Therefore, to sustain a conviction under Code § 18.2-478, the evidence must show the defendant was taken into custody pursuant to a written charge; probable cause to arrest will not suffice to satisfy the 'on a charge of criminal offense' element stated in Code § 18.2-478.
>
> *Id.*

Target of Force or Violence: "An accused can be convicted of escaping from an officer by using force or violence not directed at the officer." *Henry, 21 Va. App. at 141, 462 S.E.2d at 582*. For example, an accused may be convicted of this offense for jimmying the lock of a police car. *Id.*

Other statutes that criminalize escape from the custody of an officer include escape without force from the custody of an officer, Va. Code Ann. § 18.2-479 (Instructions No. 42.140, Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation) and 42.150, Escape—Without Force or Violence

(Charged With or Convicted of Felony)), fleeing from a law enforcement officer, Va. Code Ann. § 18.2-460(E), and escape following conviction, Va. Code Ann. § 18.2-477.

***ALERTS*:**

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.140

Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation)

The defendant is charged with the crime of escape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [confined in jail; in the custody of any court; in the custody of any officer of the court; in the custody of any law enforcement officer] **for** [violation of probation or parole; a charge or conviction of a misdemeanor]**; and**

(2) **That the defendant escaped from** [jail; custody]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.140

Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation)

You have found the defendant guilty of the crime of escape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-479(A).

CASE AUTHORITY:

White v. Commonwealth, 267 Va. 96, 103–05, 591 S.E.2d 662, 666–68 (2004); *Coles v. Commonwealth, 44 Va. App. 549, 554–62, 605 S.E.2d 784, 786–90 (2004)*; *Williams v. Commonwealth, 29 Va. App. 696, 698–700, 514 S.E.2d 381, 382–83 (1999)*; *Cavell v. Commonwealth, 28 Va. App. 484, 486–87, 506 S.E.2d 552, 552 (1998)* (en banc).

PRACTICE COMMENTARY: A jail escapee may also be prosecuted under Va. Code Ann. § 53.1-203(1), which is classified as a Class 6 felony and may carry a mandatory minimum sentence of 1 year of imprisonment. See Instructions No. 42.100, Escape—General and 42.110, Escape—General (Felon).

Where the Commonwealth seeks a conviction of misdemeanor escape under Va. Code Ann. § 18.2-479(A), the Commonwealth is not required to prove the class of the crime underlying the defendant's custody. *Williams, 29 Va. App. at 700, 514 S.E.2d at 383.*

ALERTS:

• This instruction applies to persons lawfully confined or lawfully in custody on a charge or conviction of a misdemeanor or for violation of probation or parole. For persons lawfully in custody for a felony, see Instruction No. 42.150, Escape—Without Force or Violence (Charged With or Convicted of Felony).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.150

Escape—Without Force or Violence (Charged With or Convicted of Felony)

The defendant is charged with the crime of escape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was charged with or convicted of a felony;**

(2) **That the defendant was** [confined in jail; in the custody of any court; in the custody of any officer of the court; in the custody of any law enforcement officer pursuant to a written charge]**; and**

(3) **That the defendant left the** [jail; custody] **without lawful permission.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.150

Escape—Without Force or Violence (Charged With or Convicted of Felony)

You have found the defendant guilty of the crime of escape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-479(B).

CASE AUTHORITY:

Thomas v. Commonwealth, 56 Va. App. 1, 5–7, 690 S.E.2d 298, 300–01 (2010); Davis v. Commonwealth, 45 Va. App. 12, 15–16, 608 S.E.2d 482, 484 (2005); White v. Commonwealth, 267 Va. 96, 103–05, 591 S.E.2d 662, 666–68 (2004); Williams v. Commonwealth, 29 Va. App. 696, 700, 514 S.E.2d 381, 383 (1999).

PRACTICE COMMENTARY: A jail escapee on charge or conviction of a felony may also be prosecuted under Va. Code Ann. § 53.1-203(1). See Instructions No. 42.100, Escape—General and 42.110, Escape—General (Felon).

Where the Commonwealth seeks conviction under subsection (B) of Va. Code Ann. § 18.2-479, it must prove that the crime underlying the defendant's custody is a felony. *Williams, 29 Va. App. at 700, 514 S.E.2d at 383.*

Va. Code Ann. § 18.2-477 deals with escape by force and violence, other than by setting fire, and applies to a person in jail or custody after conviction. The offense is a Class 6 felony. Under Va. Code Ann. § 18.2-477, the term of confinement for escape begins upon the expiration of the former sentence. There is no instruction for this statute.

PRACTICE POINTER:

For a discussion of custody, charges, and arrest, see *Coles v. Commonwealth, 44 Va. App. 549, 553–62, 605 S.E.2d 784, 786–90 (2004).*

To sustain a conviction under Va. Code Ann. § 18.2-479(B) when the defendant is in the custody of a law enforcement officer, "the evidence must show that the defendant was taken into custody pursuant to a *written charge*; probable cause to arrest will not suffice" *Thomas, 56 Va. App. at 7, 690 S.E.2d at 300–01; Hubbard v. Commonwealth, 276 Va. 292, 296, 661 S.E.2d 464, 467 (2008).* A charge is "a formal written accusation or complaint, which initiates a prosecution." *Id.*

ALERTS:

• This instruction applies to persons lawfully confined or lawfully in custody on a charge or conviction of a felony. For persons confined or in custody for a misdemeanor, see Instruction No. 42.140, Escape—Without Force or Violence (Misdemeanor or Probation or Parole Violation).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.160

Escape—Furlough

The defendant is charged with the crime of escape from furlough. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a prisoner in (specify state correctional facility)**; and**

(2) That the defendant was granted a furlough from the facility; and

(3) That the defendant [failed to return to the place designated within the prescribed time; failed to remain within the limits of confinement] **set by the furlough; and**

(4) That the defendant's failure to do so was willful.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty as charged [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has proved beyond a reasonable doubt each of the first three elements of the crime as charged, but if you find that the Commonwealth has failed to prove beyond a reasonable doubt willful failure under element four, and if you further find that the Commonwealth has proved beyond a reasonable doubt that the defendant's failure was without authority or just cause, you shall find the defendant guilty of misdemeanor escape from furlough [and you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than six (6) months; or

(2) A fine of a specific amount, but not more than $1,000; or

(3) Confinement in jail for a specific time, but not more than six (6) months, and a fine of a specific amount, but not more than $1,000].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first three elements above, or, having proved beyond a reasonable doubt each of the first three elements, has failed to prove beyond a reasonable doubt that the defendant's failure was either willful under element four or was without just cause or authority, then you shall find the defendant not guilty.

Instruction No. P42.160

Escape—Furlough (Felony)

You have found the defendant guilty of the crime of escape from furlough from a state correctional facility.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-37(D) and (E).

CASE AUTHORITY:

Yingling v. Commonwealth, 21 Va. App. 315, 318-20, 464 S.E.2d 174, 175–76 (1995); Lambert v. Commonwealth, 6 Va. App. 360, 363–65, 367 S.E.2d 745, 746–47 (1988).

PRACTICE COMMENTARY: The punishment provision, unless it is reduced to a misdemeanor, is that for escape from a state correctional facility under Va. Code Ann. § 53.1-203(1), and carries a mandatory minimum sentence of 1 year of imprisonment. Because the misdemeanor escape from furlough is punished as a Class 2 misdemeanor, the punishment provision is contained within the finding instruction if the defendant opts for jury sentencing. See Va. Code Ann. § 19.2-295.1 which provides for bifurcated trials only in cases involving felonies and Class 1 misdemeanors.

The distinction between the felony and misdemeanor subsections of Va. Code Ann. § 53.1-37 is the element of willfulness, i.e. a felony offense must be willful.

> "The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful. . . ."

Lambert, 6 Va. App. at 362–63, 367 S.E.2d at 746; United States v. Murdock, 290 U.S. 389, 394 (1933).

Mere failure to return does not entitle the Commonwealth to an inference of "willfulness." "The plain language of the statute requires that the Commonwealth prove willfulness beyond a reasonable doubt. That element of the crime will not be inferred from an absence of evidence to the contrary." *Lambert, 6 Va. App. at 363–64, 367 S.E.2d at 747.*

ALERTS:

• Va. Code Ann. § 53.1-37 applies only to prisoners on furlough from state correctional facilities. Furloughs from work release programs are governed by Va. Code Ann. § 53.1-132; violation of such furlough restrictions is a Class 1 misdemeanor. No specific instruction is provided for such a violation.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.170

Escape—Work Release (State Prisoner)

The defendant is charged with the crime of failing to comply with the conditions of work release. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was a prisoner sentenced to confinement in a correctional facility; and**

(2) **That the defendant, without proper authority and without just cause,** [left the area in which he had been assigned to work; left the area in which he had been assigned to attend an educational or community activity program; left the vehicle or route involved in his going to or coming from the place to which he had been assigned for educational purposes or to work]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of felony escape, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

However, if you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, and you further find there are mitigating circumstances or the culpability of the defendant is minimal, you shall find the defendant guilty of misdemeanor escape, [and you shall fix the defendant's punishment at:

(1) **Confinement in jail for a specific time, but not more than six (6) months; or**

(2) **A fine of a specific amount, but not more than $1,000; or**

(3) **Confinement in jail for a specific time, but not more than six (6) months, and a fine of a specific amount, but not more than $1,000].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the above crimes, then you shall find the defendant not guilty.

Instruction No. P42.170

Escape—Work Release (State Prisoner) (Felony)

You have found the defendant guilty of felony escape for failing to comply with the conditions of work release.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-60(D).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Misdemeanor escape from furlough is punished as a Class 2 misdemeanor. Va. Code Ann. § 53.1-60(D). If the defendant opts for jury sentencing, the punishment provision is contained within the finding instruction pursuant to the requirements of Va. Sup. Ct. R. 3A:17.1(c), which requires the court at the conclusion of all of the evidence to instruct the jury as to punishment with respect to any Class 2, 3 or 4 misdemeanor being tried in the same proceeding or any lesser-included Class 2, 3 or 4 misdemeanor of any charged felony offense which may be properly considered by the jury and of Va. Code Ann. § 19.2-295.1, which provides for bifurcated trials only in cases involving felonies and Class 1 misdemeanors.

ALERTS:

• Va. Code Ann. § 53.1-60 applies to state prisoners only. See Instruction No. 42.180, Escape—Work Release (Jail Inmate) on escape from work release of prisoner sentenced to jail confinement.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape, §§ 1–4

Instruction No. 42.180

Escape—Work Release (Jail Inmate)

The defendant is charged with the crime of failing to comply with the conditions of work release. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a prisoner sentenced to confinement in jail; and

(2) That the defendant, without proper authority and without just cause, [left the area in which he had been assigned to work; left the area in which he had been assigned to attend an educational or other rehabilitative program; left the vehicle or route involved in his going to or coming from the place to which he had been assigned for educational or other rehabilitative purposes or to work]**; and**

(3) That the defendant left the Commonwealth.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of failing to comply with the conditions of work release (felony) [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged, but that the Commonwealth has failed to prove beyond a reasonable doubt the third element, then you shall find the defendant guilty of failing to comply with the conditions of work release (misdemeanor) [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either element (1) or element (2) above, or both, then you shall find the defendant not guilty.

The defendant is charged with the crime of failing [illegible] with the conditions of work release. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was a prisoner sentenced to [illegible] and confined in the Hampden County correctional facility [illegible]

(2) That the area in which he had been assigned to work left the area in which he was confined [illegible]

(3) That he failed to return to the correctional facility [illegible]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you should find the defendant guilty of failing to return to the correctional facility [illegible] to prove beyond a reasonable doubt each of the above elements, then you must find the defendant not guilty.

If you find that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged, but that the Commonwealth has failed to prove beyond a reasonable doubt the third element, then you must find the defendant guilty of failing to comply with the conditions of work release (misdemeanor) [but you should not fix the punishment until your verdict has been returned and the other evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either element (1) or element (2) above, or both, then you shall find the defendant not guilty.

Instruction No. P42.180(a)

Escape—Work Release (Jail Inmate) (Felony)

You have found the defendant guilty of the crime of failing to comply with the conditions of work release, and that defendant left the jurisdiction of the Commonwealth of Virginia.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. T-42.180(a)

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P42.180(b)

Escape—Work Release (Jail Inmate) (Misdemeanor)

You have found the defendant guilty of the crime of failing to comply with the conditions of work release. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-131.

CASE AUTHORITY:

Mabe v. Commonwealth, 14 Va. App. 439, 441–42, 417 S.E.2d 899, 900 (1992).

PRACTICE COMMENTARY: Va. Code Ann. § 53.1-131 provides that an offender who leaves the Commonwealth may be found guilty of an escape under Va. Code Ann. § 18.2-477. If the offender does not leave the Commonwealth, he is guilty of a Class 1 misdemeanor under Va. Code Ann. § 53.1-131.

ALERTS:

• This Instruction and statute apply to prisoners sentenced to jail confinement only. See Instruction No. 42.170, Escape—Work Release (State Prisoner) (Felony) for escape from work release of a prisoner sentenced to a state correctional facility.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.200

Escape—Aiding (Felony)

The defendant is charged with the crime of aiding the escape of a prisoner. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the prisoner was in** [jail; prison; custody] **on a** [conviction; charge] **of a felony; and**

(2) **That the defendant** [conveyed (name thing conveyed) into the [jail; prison; (name of place where prisoner held in custody)] with intent to make easier the escape of a prisoner; in any way aided a prisoner to escape; in any way aided a prisoner in an attempt to escape; took or attempted to take the prisoner from [jail; prison; custody], by force]**; and**

(3) **That the prisoner did escape.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt [illegible] of the crime as charged, then you should find the defendant guilty [but you shall not fix the punishment unless you find this has been proved and further evidence has been heard in mitigation].

If you find not the [illegible] beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.200

Escape—Aiding (Felony)

You have found the defendant guilty of the crime of aiding the escape of a prisoner.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-473

CASE AUTHORITY:

Massie v. Commonwealth, 140 Va. 557 125 S.E. 146 (1924).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-473(2) does not expressly require intent, though subsection (1) does. In *Massie*, a defendant who merely purchased saws at another's direction and provided the saws to that person, who later used the saws to aid in a prisoner's escape, could not be guilty of conveying a thing into a jail with the intent to facilitate the escape.

A felony violation of Va. Code Ann. § 18.2-473 is not a classified felony. The punishment is set forth in the statute.

The delivery of any article to any prisoner, without first securing the permission of the person in charge of the prisoner, is a Class 1 misdemeanor under Va. Code Ann. § 18.2-474.

The delivery of drugs (including marijuana), firearms, ammunition, or explosives is a distinct felony covered by Va. Code Ann. § 18.2-474.1. See Instructions No. 42.300, Contraband—Delivery of Marijuana or Controlled Drug to Prisoner and 42.320, Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner.

The delivery of a cellular telephone is also a distinct felony covered by Va. Code Ann. § 18.2-431.1.

ALERTS:

• If the prisoner does not escape or if the prisoner was not detained on a felony conviction or charge, a conviction under this statute is punishable as a Class 1 misdemeanor, and Instruction No. 42.220, Escape—Aiding (Misdemeanor) should be used.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.220

Escape—Aiding (Misdemeanor)

The defendant is charged with the crime of aiding the escape of a prisoner. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the prisoner was lawfully in [jail; prison; custody]**; and**

(2) That the defendant [conveyed (name thing conveyed) into the [jail; prison; (name of place where prisoner held in custody)] with intent to make easier the escape of a prisoner; in any way aided a prisoner to escape; in any way aided a prisoner in an attempt to escape; took or attempted to take the prisoner from [jail; prison; custody], by force]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.220

Escape—Aiding (Misdemeanor)

You have found the defendant guilty of the crime of aiding the escape of a prisoner.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-473.

Case Authority:

None.

Practice Commentary: The delivery of any article to any prisoner, without first securing the permission of the person in charge of the prisoner, is a Class 1 misdemeanor under Va. Code Ann. § 18.2-474.

The delivery of drugs (including marijuana), firearms, ammunition, or explosives is a distinct felony covered by Va. Code Ann. § 18.2-474.1. See Instructions No. 42.300, Contraband—Delivery of Marijuana or Controlled Drug to Prisoner and 42.320, Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner.

The delivery of a cellular telephone is also a distinct felony covered by Va. Code Ann. § 18.2-431.1.

Alerts:

• Va. Code Ann. § 18.2-473 also prohibits aiding the escape of a child "placed in a local juvenile detention home, or committed to the Department of Juvenile Justice in any juvenile correctional center, or Reception and Diagnostic Center for Children or held in custody." This scenario has not been incorporated in the instruction.

• If the prisoner or child was detained "on conviction, commitment or charge of felony" and the escape is effected, aiding the escape is a felony. See Instruction No. 42.200, Escape—Aiding (Felony). This misdemeanor instruction is used when the escape is not effected or when the detainment is not "on conviction, commitment or charge of felony." Va. Code Ann. § 18.2-473.

Research References:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure § 27.3

Michie's Jurisprudence, Escape §§ 1–4

Instruction No. 42.240

Escape—Voluntarily Allowing Person Charged with Felony or Felon to Escape

The defendant is charged with the crime of voluntarily allowing a prisoner to escape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [a sheriff; a jailer; an officer; a guard; an employee of a sheriff, jailer or other officer]**; and**

(2) **That the defendant had in his custody a prisoner** [detained on a charge of a felony; convicted of a felony]**; and**

(3) **That the defendant voluntarily allowed the prisoner to escape.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime then you shall find the defendant not guilty.

The defendant is charged with the crime of voluntarily allowing a prisoner to escape. The Commonwealth must prove beyond a reasonable doubt the following elements of that crime:

Instruction No. P42.240

Escape—Voluntarily Allowing Person Charged with Felony or Felon to Escape

You have found the defendant guilty of the crime of voluntarily allowing a prisoner to escape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-475.

CASE AUTHORITY:

Watts v. Commonwealth, 99 Va. 872, 39 S.E. 706 (1901).

PRACTICE COMMENTARY: A sheriff cannot be held criminally liable under this statute for the misfeasance of his deputy, although he is the "legal custodian" of jailees. *Watts*, 99 Va. at 875–76.

Willfully and deliberately allowing a person charged with misdemeanor or misdemeanant to escape, or willfully refusing to receive into custody a person lawfully committed thereto is a Class 2 misdemeanor. Va. Code Ann. § 18.2-476. No specific instruction is provided for this scenario.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Escape and Related Crimes," "Prisoner-Related Crimes," and "Resisting Arrest"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 27.3

MICHIE'S JURISPRUDENCE, Escape §§ 1–4

Instruction No. 42.300

Contraband—Delivery of Marijuana or Controlled Drug to Prisoner

The defendant is charged with the crime of [delivering; attempting to deliver; conspiring to deliver] [marijuana; (name of controlled drug)] **to a prisoner. The Commonwealth must prove beyond a reasonable doubt that the defendant willfully** [delivered; attempted to deliver; conspired to deliver] [marijuana; (name of controlled drug)] **to a prisoner.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

45.30A Instructions—Delivery of Marijuana or Controlled Drug to Prisoner

The defendant is charged with the crime of [delivering; attempting to deliver; ... (here, describe crime)] [drug] to a prisoner. The Commonwealth must prove beyond a reasonable doubt that the defendant ... (here, describe element)

If you find that the evidence that the defendant [delivered; ...] was reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P42.300

Contraband—Delivery of Marijuana or Controlled Drug to Prisoner

You have found the defendant guilty of the crime of [delivering; attempting to deliver; conspiring to deliver] [marijuana; (name of controlled drug)] **to a prisoner.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-474.1.

CASE AUTHORITY:

Lewis v. Commonwealth, 15 Va. App. 337, 339–41, 423 S.E.2d 371, 373–74 (1992); Williams v. Commonwealth, 12 Va. App. 912, 914–15, 407 S.E.2d 319, 321–22 (1991); Henry v. Commonwealth, 2 Va. App. 194, 199, 342 S.E.2d 655, 658 (1986).

PRACTICE COMMENTARY: Va. Code Ann. § 54.1-3401 et seq. regulates and defines controlled drugs and is incorporated into Va. Code Ann. § 18.2-474.1. See Va. Code Ann. § 18.2-248 and Instruction No. 22.300, Schedule I or II Controlled Substance—Possession With Intent to Manufacture, Sell, Give or Distribute: No Evidence of Accommodation for distribution of controlled drugs generally. See Va. Code Ann. § 18.2-248.1 and Instruction No. 22.320, Marijuana—Possession With Intent to Manufacture, Sell, Give or Distribute: No Evidence of Accommodation for distribution of marijuana generally. Possession of marijuana is not a lesser included offense of delivering marijuana to a prisoner. Therefore, Double Jeopardy does not bar a conviction under Va. Code Ann. § 18.2-474.1 even though the defendant was previously convicted of possession of marijuana. *Logan v. Commonwealth, 43 Va. App. 504, 507–08, 600 S.E.2d 133, 134–35 (2004).*

If a defendant is charged with conspiracy to deliver, venue is proper in any locality in which an act in furtherance of the conspiracy took place, and where the conspiracy was entered into, pursuant to Va. Code Ann. § 19.2-244. *Henry, 2 Va. App. at 199.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drug Offenses" and "Prisoner-Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.3

MICHIE'S JURISPRUDENCE, Prisons and Prisoners §§ 1, 2, 8, 10

Instruction No. 42.320

Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner

The defendant is charged with the crime of [delivering; attempting to deliver; conspiring to deliver] [a firearm; ammunition; an explosive] **to a prisoner. The Commonwealth must prove beyond a reasonable doubt that the defendant willfully** [delivered; attempted to deliver; conspired to deliver] **to the prisoner** [a firearm; ammunition for a firearm; an explosive].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, [you shall find the defendant guilty, but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P42.320

Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner

You have found the defendant guilty of the crime of [delivering; attempting to deliver; conspiring to deliver] [a firearm; ammunition; an explosive] **to a prisoner.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-474.1.

CASE AUTHORITY:

Henry v. Commonwealth, 2 Va. App. 194, 199, 342 S.E.2d 655, 658 (1986).

PRACTICE COMMENTARY: If a defendant is charged with conspiracy to deliver, venue is proper in any locality in which an act in furtherance of the conspiracy took place, and where the conspiracy was entered into, pursuant to Va. Code Ann. § 19.2-244. *Henry, 2 Va. App. at 199.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Prisoner-Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 20.1–20.3

MICHIE'S JURISPRUDENCE, Prisons and Prisoners §§ 1, 2, 8, 10

Instruction No. 42.400

Contraband—Possession of Firearm or Firearm Ammunition by Prisoner

The defendant is charged with the crime of possessing [a firearm; ammunition for a firearm]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [was a prisoner in (specify correctional facility as defined in Va. Code Ann. § 53.1-1); in the custody of an employee of (specify correctional facility as defined in Va. Code Ann. § 53.1-1)]**; and**

(2) **That the defendant had in his possession in such** [institution; custody] [a firearm; ammunition for a firearm]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the [illegible] then you [illegible] the defendant guilty. But you can find the defendant guilty [illegible] if you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.400

Contraband—Possession of Firearm or Firearm Ammunition by Prisoner

You have found the defendant guilty of the crime of possessing [a firearm; ammunition for a firearm]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 53.1-203(7).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: If the charge is introduction into a correctional facility of firearms or ammunition by a prisoner, rather than possession, Element (2) of the instruction should be changed accordingly.

The related offenses of possession of a tool for escape, an instrument which can cause injury, or a chemical compound, covered by subsections 3, 4 and 5 of Va. Code Ann. § 53.1-203, are not given separate instructions. It is suggested that this instruction be adapted for use in cases prosecuted under those provisions.

Instructions No. 42.300, Contraband—Delivery of Marijuana or Controlled Drug to Prisoner and 42.320, Contraband—Delivery of Firearm, Ammunition or Explosive to Prisoner cover prosecutions of non-prisoners for delivering contraband to prisoners.

☞ ***PRACTICE POINTER:***

Subsection 6 of Va. Code Ann. § 53.1-203 prohibits a prisoner from procuring, selling, secreting or possessing a Schedule III controlled substance or marijuana, and is classified as a Class 5 felony. Violations of all other subsections of Va. Code Ann. § 53.1-203 are Class 6 felonies.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Prisoner-Related Crimes" and "Weapons Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 22.1, 22.5

MICHIE'S JURISPRUDENCE, Prisons and Prisoners §§ 1, 2, 8, 10; and Weapons §§ 1–4.1, 9, 12

Instruction No. 42.500

Prisoner—Injuries to Non-Prisoner

The defendant is charged with the crime of injuring another person while the defendant was a prisoner in a state or local correctional facility. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant was** [a prisoner in (name correctional facility as defined in Va. Code Ann. § 53.1-1); an inmate of (name correctional facility); in the custody of an employee of (name correctional facility)]**; and**

(2) **That the defendant injured** [an employee of (name correctional facility); a person lawfully admitted to such institution; a person supervising or working with prisoners]**; and**

(3) **That the injury was inflicted knowingly and willfully.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 12.500

Prisoner—Injuries to Non-Prisoner

Instruction No. P42.500

Prisoner—Injuries to Non-Prisoner

You have found the defendant guilty of the crime of injuring another person while the defendant was a prisoner in a state or local correctional facility.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-55(A).

CASE AUTHORITY:

Seegars v. Commonwealth, 18 Va. App. 641, 644–45, 445 S.E.2d 720, 722–23 (1994).

PRACTICE COMMENTARY: Misdemeanor assault and battery is a lesser-included offense of this crime. *Seegars, 18 Va. App. at 644–45.*

Va. Code Ann. § 18.2-55(A)(4) also covers injuries to persons other than fellow prisoners while a prisoner is committing any act in violation of Va. Code Ann. § 53.1-203, while Va. Code Ann. § 18.2-55(B) covers injury to a probation and parole officer by a probationer or parolee.

Va. Code Ann. § 18.2-55 also applies to persons confined in a detention home or juvenile facility.

ALERTS:

• Va. Code Ann. § 18.2-55 does not cover injury to a fellow prisoner. Va. Code Ann. § 53.1-204 provides that the commission of any felony by a prisoner other than as provided in Va. Code Ann. §§ 18.2-31, 18.2-55, or 53.1-203 is to carry the same punishment for prisoners as for any other person convicted of the felony.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding" and "Prisoner-Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; Mayhem §§ 1–11; and Prisons and Prisoners § 10

Instruction No. 42.520

Probationer (Parolee)—Injuries to Probation (Parole) Officer

The defendant is charged with the crime of injuring a [probation; parole; local probation; local pretrial services] **officer while the defendant was** [under the officer's supervision; being investigated by the officer]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant was a** [probationer; parolee] [under the supervision of a; under investigation by a] [probation; parole; local probation; local pretrial services] **officer;**

(2) **That the defendant injured the officer while the officer was in the performance of his duty;**

(3) **That the defendant knew or had reason to know that the** [probation; parole; local probation; local pretrial services] **officer was in the performance of his duty; and**

(4) **That the injury was inflicted knowingly and willfully.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P42.520

Probationer (Parolee)—Injuries to Probation (Parole) Officer

You have found the defendant guilty of the crime of injuring a [probation; parole; local probation; local pretrial services] **officer while the defendant was under the officer's supervision.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-55(B).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Assault, Battery and Wounding" and "Prisoner-Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 4.1–4.8

MICHIE'S JURISPRUDENCE, Assault and Battery §§ 1–17; Mayhem §§ 1–11; and Prisons and Prisoners § 10

CHAPTER 43

PROPERTY—DAMAGE TO AND TAMPERING WITH

Scope Note

Instruction No. 43.100 Maiming, Killing, or Poisoning Animals

Instruction No. P43.100 Maiming, Killing, or Poisoning Animals

Instruction No. 43.200 Breaking, Injuring, Defacing, Destroying, or Preventing the Operation of Vehicle, Aircraft, or Boat

Instruction No. P43.200 Breaking, Injuring, Defacing, Destroying or Preventing the Operation of Vehicle, Aircraft, or Boat

Instruction No. 43.250 Willful Disposition or Destruction of Watercraft (Felony)

Instruction No. P43.250 Willful Disposition or Destruction of Watercraft (Felony)

Instruction No. 43.300 Opening or Carrying Away Containers Used for Dispensing Fuel Oils

Instruction No. P43.300 Opening or Carrying Away Containers Used for Dispensing Fuel Oils

Instruction No. 43.400 Tampering with Device Designed to Receive Money

Instruction No. P43.400 Tampering with Device Designed to Receive Money

Instruction No. 43.500 Damage to Utility Facility

Instruction No. P43.500 Damage to Utility Facility

SCOPE NOTE

The first five instructions in this chapter cover the principal crimes included in Chapter 5, Article 7 of Title 18.2, Damage to and Tampering with Property.

Instruction No. 43.100, derived from Va. Code Ann. § 18.2-144, addresses the maiming, killing, and poisoning of animals.

Va. Code Ann. § 18.2-146, on which Instruction No. 43.200 is based, concerns the crime of breaking, injuring, defacing, destroying, or preventing the operation of a vehicle, aircraft, or boat. Va. Code Ann. § 18.2-148 exempts those acts from criminal liability where they involve bona fide repossession under lien.

Instruction No. 43.250 deals with the willful destruction of watercraft as proscribed by Va. Code Ann. § 18.2-150.

Instruction No. 43.300 sets forth the elements of larceny resulting from the opening or carrying away of containers used for the dispensing of fuels or motor oils proscribed by Va. Code Ann. § 18.2-151.

Instruction No. 43.400, based on Va. Code Ann. § 18.2-152, addresses stealing from or tampering with parking meters, vending machines, and other devices designed to receive money.

Instruction No. 43.500, based on Va. Code Ann. § 18.2-162, deals with damage to a utility facility. No instructions for other crimes included in Chapter 5, Article 8 of Title 18.2 are provided.

Although instructions are not provided for them, note that Article 7 also prohibits among other crimes certain acts against police animals (Va. Code Ann. § 18.2-144.1) and homing pigeons (Va. Code Ann. § 18.2-145); entering or setting in motion a vehicle, aircraft, or the like with mischievous or criminal intent (Va. Code Ann. § 18.2-147); and injuring hired animals, aircrafts, vehicles, or boats through reckless or unlawful use (Va. Code Ann. § 18.2-149).

Instructions for certain acts relating to crimes involving computers, as set forth in Article 7.1, may be found in **Chapter 13, Computer Crimes**. Instruction No. 13.300, Computer Trespass and Lesser Included Offenses covers the first six of the eight types of computer trespass addressed in Va. Code Ann. § 18.2-152.4: removing, halting, or disabling computer data or software; causing a computer to malfunction; altering or erasing computer data; using a computer to effect the creation or alteration of a financial instrument or of an electronic transfer of funds; using a computer to cause physical injury to the property of another; and using a computer network to make an unauthorized copy. Instruction No. 13.310, Computer Trespass—Recording Keystrokes covers computer trespass by recording keystrokes, and Instruction No. 13.320, Computer Trespass—Installing Software covers computer trespass by installing harmful software.

Instruction No. 43.100

Maiming, Killing, or Poisoning Animals

The defendant is charged with the crime of [maiming; killing; poisoning] **an animal. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [shot; stabbed; wounded; caused bodily injury to; administered poison to; exposed poison with intent that it be taken by] [a horse; a mule; a pony; cattle; swine; livestock] **which belonged to another person; and**

(2) **That the defendant intended to** [maim; disfigure; disable; kill] **such animal; and**

(3) **That the defendant acted with malice.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.100

Maiming, Killing, or Poisoning Animals

You have found the defendant guilty of the felony of [maiming; killing; poisoning] **an animal.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-144.

CASE AUTHORITY:

Ford v. Commonwealth, 48 Va. App. 262, 266–67, 630 S.E.2d 332, 335 (2006); *Winckler v. Commonwealth, 155 Va. 1146, 1150, 156 S.E. 364, 365 (1931).*

PRACTICE COMMENTARY:

Additional felony offenses. Va. Code Ann. § 18.2-144 also prohibits the shooting, stabbing, wounding, and the like of one's own horse or other livestock with intent to defraud any insurer thereof. If any of those acts and intent are alleged, the elements of the instruction accordingly should be modified. The punishment for those acts is identical to that set forth above.

Additional offense as to fowl and companion animals. Any of the acts prohibited by the statute that are directed against fowl or any companion animal, coupled with any of the various kinds of intent listed in the statute, constitute a Class 1 misdemeanor. A second or subsequent offense involving fowl or a companion animal is a Class 6 felony if the second or subsequent offense or any previous offense resulted in the death of the animal or a licensed veterinarian recommended euthanasia of the animal "upon determination that such euthanasia was necessary due to the condition of the animal, and such condition was a direct result of a violation of this section." Jury instructions have not been provided for those offenses or punishments, but may be created using the format of this instruction as a guide.

PRACTICE POINTER:

Va. Code Ann. § 18.2-144.1 prohibits killing or injuring police animals. A violation is punishable as a Class 5 felony and restitution, including training expenses, is mandatory.

For other statutes criminalizing various acts of cruelty to animals, see Va. Code Ann. §§ 3.2-6570, 3.2-6570.1, 3.2-6571, and 3.2-6573.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Cruelty to Animals" and "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Animals §§ 4, 14, 15; Malicious Mischief §§ 1–6; Poisons and Poisoning §§ 1–2; and Trespass §§ 1, 2, 27

Instruction No. 43.200

Breaking, Injuring, Defacing, Destroying, or Preventing the Operation of Vehicle, Aircraft, or Boat

The defendant is charged with the crime of [breaking; injuring; defacing; destroying; preventing the operation of] [a vehicle; an aircraft; a boat; a vessel]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant individually or in association with one or more persons** [tampered with; injured; broke; removed] [a part of; parts of] [a vehicle; an aircraft; a boat; a vessel]**; and**

(2) **That the act was done for the purpose of** [injuring; defacing; destroying] **the** [vehicle; aircraft; boat; vessel]**; and**

(3) **That the defendant acted willfully.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty. But you shall not do so unless you unanimously find that the Commonwealth has proved beyond a reasonable doubt each and every one of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.200

Breaking, Injuring, Defacing, Destroying or Preventing the Operation of Vehicle, Aircraft, or Boat

You have found the defendant guilty of the crime of [breaking; injuring; defacing; destroying; preventing the operation of] [a vehicle; an aircraft; a boat; a vessel]**.**

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-146.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-146 also prohibits the enumerated acts when done for the purpose of temporarily or permanently preventing the operation of the vehicle, or for any purpose contrary to the will or without the consent of the owner of the vehicle. Maliciously or willfully interfering with or preventing the operation of a vehicle is proscribed by the same section.

Va. Code Ann. § 5.1-22 prohibits the projection of a point of light from a laser, laser gun sight, or any other device simulating a laser at an aircraft. This section also makes it a Class 6 felony to interfere with the operation of any aircraft which endangers the life of the aircraft's operator or any other person.

☞ ***PRACTICE POINTER:***

See Va. Code Ann. § 5.1-16 with regard to tampering with airplanes or markings of airports, landing fields, and other aeronautical facilities.

ALERTS:

• This section does not apply to a bona fide repossession of a vehicle, aircraft, boat, or vessel by the holder of a lien on such vehicle, aircraft, boat, or vessel, or by an agent or employee of the lien holder. See Va. Code Ann. § 18.2-148.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Automobiles § 126.3; Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.250

Willful Disposition or Destruction of Watercraft (Felony)

The defendant is charged with the crime of [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [scuttled; cast away; disposed of; destroyed in any manner] **a** [ship; vessel; watercraft]**; and**

(2) **That the defendant did the act with the intent to** [injure; defraud] **the owner or any insurer of the** [ship; vessel; watercraft]**; and**

(3) **That the defendant acted willfully; and**

(4) **That the value of the** [ship; vessel; watercraft] **or any property on board was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has failed to prove beyond a reasonable doubt that the value of the [ship; vessel; watercraft; property on board] **was $1,000 or more, then you shall find the defendant guilty of misdemeanor** [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft] **[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If the Commonwealth has failed to prove any of the first three elements of the crime beyond a reasonable doubt, you shall find the defendant not guilty.

Instruction No. P43.250

Willful Disposition or Destruction of Watercraft (Felony)

You have found the defendant guilty of the felony of [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-150

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The statute forbids damage to watercraft with the intent of injuring "any property on board the" watercraft, or acts done with the intent to defraud any insurer of the watercraft. Va. Code Ann. § 18.2-150.

If the defendant is found guilty of the misdemeanor offense, substitute Instruction No. 54.700, Class 1 Misdemeanor for Instruction No. P43.250.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Automobiles § 126.3; Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.300

Opening or Carrying Away Containers Used for Dispensing Fuel Oils

The defendant is charged with the crime of [opening; breaking and opening; carrying away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [opened; broke and opened; carried away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**; and**

(2) **That the defendant acted with intent to steal** [gasoline; kerosene; motor oil]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Opening or Carrying away Containers Used for Dispensing Fuel Oils

The defendant is charged with the crime of [opening; breaking and opening; entering, entering and opening] [a] [the] [vehicle, automobile, motor car] [truck] [trailer] [semi-trailer] [railroad car] [boat] [barge] [aircraft] [warehouse] [building] [room] [enclosure] [yard] [area] [tank] [tank car] [tank truck] [tank trailer] [tank semi-trailer] [pipeline] [pump] [meter] [valve] [connection] [fitting] [faucet] [hose] [nozzle] [container] [receptacle] [vessel] [can] [bucket] [drum] [barrel] [tub] [pail] [jug] [bottle] [jar] [flask] [carboy] [demijohn] [keg] [cask] [tun] [butt] [hogshead] [puncheon] [pipe] [tube] [conduit] [line] [main] [lateral] [riser] [standpipe] [gauge] [glass] [indicator] [sight] [level] [dial] [pressure] [vacuum] [suction] [discharge] [intake] [exhaust] [vent] [manhole] [cover] [plug] [stopper] [cap] [lock] [seal] [key] [padlock] [chain] [wire] [cable] [rope] [string] [twine] [cord] [thread] [yarn] [fabric] [cloth] [canvas] [burlap] [sacking] [bag] [sack] [pouch] [wrapper] [envelope] [package] [parcel] [box] [carton] [crate] [case] [basket] [hamper] [bin] [chest] [trunk] [locker] [cabinet] [closet] [shelf] [rack] [stand] [table] [desk] [counter] [bench] [seat] [chair] [stool] [ladder] [step] [platform] [floor] [deck] [wall] [partition] [door] [gate] [window] [roof] [ceiling] [skylight] [transom] [ventilator] [louver] [grille] [screen] [shutter] [blind] [curtain] [drapery] [awning] [canopy] [tent] [shed] [garage] [barn] [stable] [silo] [granary] [elevator] [mill] [factory] [plant] [refinery] [station] [depot] [terminal] [dock] [wharf] [pier] [quay] [slip] [basin] [harbor] [port] [yard] [field] [lot] [tract] [parcel] [premises] [property] [land] [ground] [soil] [earth] [dirt] [sand] [gravel] [rock] [stone] [concrete] [asphalt] [pavement] [road] [street] [highway] [path] [walk] [sidewalk] [curb] [gutter] [ditch] [drain] [sewer] [culvert] [bridge] [tunnel] [viaduct] [overpass] [underpass] [crossing] [intersection] [junction] [fork] [branch] [turn] [curve] [grade] [slope] [hill] [mountain] [valley] [canyon] [gorge] [cliff] [bluff] [shore] [beach] [coast] [island] [peninsula] [cape] [bay] [gulf] [sound] [strait] [channel] [river] [stream] [creek] [brook] [lake] [pond] [reservoir] [swamp] [marsh] [bog] [meadow] [pasture] [range] [prairie] [plain] [desert] [forest] [woods] [grove] [orchard] [garden] [park] [playground] [field] [stadium] [arena] [track] [course] [golf course] [tennis court] [swimming pool] [gymnasium] [clubhouse] [pavilion] [grandstand] [bleachers] [fence] [wall] [hedge] [boundary] [line] [marker] [post] [pole] [tower] [mast] [flagpole] [sign] [billboard] [poster] [notice] [placard] [banner] [flag] [pennant] [streamer] [ribbon] [badge] [emblem] [insignia] [uniform] [costume] [mask] [disguise] [weapon] [gun] [pistol] [revolver] [rifle] [shotgun] [machine gun] [submachine gun] [automatic] [semiautomatic] [bolt action] [lever action] [pump action] [single shot] [double barrel] [sawed off] [cut down] [concealed] [loaded] [unloaded] [cocked] [uncocked] [fired] [unfired] [discharged] [undischarged] [aimed] [pointed] [fired at] [struck] [missed] [hit] [wounded] [killed] [murdered] [manslaughter] [assault] [battery] [robbery] [burglary] [larceny] [theft] [stealing] [taking] [carrying away] [concealing] [receiving] [buying] [selling] [trading] [bartering] [exchanging] [giving] [lending] [borrowing] [leasing] [renting] [hiring] [employing] [using] [operating] [driving] [riding] [walking] [running] [jumping] [climbing] [falling] [sliding] [rolling] [turning] [twisting] [pulling] [pushing] [lifting] [carrying] [dragging] [throwing] [dropping] [catching] [holding] [releasing] [opening] [closing] [locking] [unlocking] [sealing] [unsealing] [breaking] [entering] [leaving] [passing] [crossing] [intersecting] [meeting] [parting] [joining] [separating] [connecting] [disconnecting] [attaching] [detaching] [fastening] [unfastening] [tying] [untying] [knotting] [unknotting] [splicing] [repairing] [mending] [patching] [covering] [uncovering] [wrapping] [unwrapping] [packing] [unpacking] [loading] [unloading] [filling] [emptying] [pouring] [dispensing] [measuring] [weighing] [counting] [numbering] [marking] [labeling] [tagging] [identifying] [describing] [recording] [writing] [printing] [typing] [signing] [sealing] [delivering] [receiving] [accepting] [refusing] [returning] [exchanging] [replacing] [substituting] [changing] [altering] [modifying] [adjusting] [regulating] [controlling] [operating] [using] [employing] [applying] [attaching] [connecting] [disconnecting] [detaching] [removing] [installing] [uninstalling] [assembling] [disassembling] [building] [constructing] [erecting] [demolishing] [destroying] [damaging] [injuring] [harming] [hurting] [killing] [murdering

Instruction No. P43.300

Opening or Carrying Away Containers Used for Dispensing Fuel Oils

You have found the defendant guilty of the felony of [opening; breaking and opening; carrying away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-151.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.400

Tampering with Device Designed to Receive Money

The defendant is charged with the crime of tampering with a device designed to receive money. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [entered; forced an entrance into; attempted to force an entrance into; tampered with; inserted any part of an instrument into] **a** [parking meter; vending machine; pay telephone; money changing machine; device designed to receive money]**; and**

(2) That the defendant intended to steal from this device.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.400

Tampering with Device Designed to Receive Money

You have found the defendant guilty of the crime of tampering with a device designed to receive money.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-152 provides that any subsequent conviction for violation of this section is punished as a Class 6 felony. A prior conviction must be alleged and proven. In such cases, the instruction would need to be revised to add as a third element proof beyond a reasonable doubt of the prior conviction. The finding portion of the instruction would also need to be revised by adding a "waterfall" section that includes the possibility for a finding of guilt on the lesser-included misdemeanor. Finally, the last paragraph of the instruction would need to be revised regarding the elements not proved that would result in a finding of not guilty. Instruction No. 42.180, Escape—Work Release (Jail Inmate) may be used as a guide.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.500

Damage to Utility Facility

The defendant is charged with the crime of destroying or damaging a utility facility. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intentionally destroyed or damaged a facility which was used to furnish [oil; telegraph; telephone; electric; gas; sewer; wastewater; water] **service to the public; and**

(2) That the cost to remedy or repair the damage was $1,000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged, but has not proved beyond a reasonable doubt that the cost to remedy or repair the damage was $1,000 or more, then you shall find the defendant guilty of misdemeanor Damage to Utility Facility. [Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of a specific amount, but not more than $500.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the crime, then you shall find the defendant not guilty.

Instruction No. P43.500

Damage to Utility Facility

You have found the defendant guilty of the felony of destroying or damaging a utility facility.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-162.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Pursuant to the provisions of Va. Code Ann. §18.2-162, if the cost to repair or remedy the damage to the facility is less than $1,000, the offense is a Class 3 misdemeanor.

If the defendant opts for jury sentencing, Va. Sup. Ct. R. 3A:17.1(c) requires the court to instruct the jury at the conclusion of all the evidence in the guilt phase of the trial as to punishment with respect to any lesser-included Class 2, 3, or 4 misdemeanor of any charged felony offense. Therefore, if the cost to repair or to remedy the damage is a contested issue to be submitted to the jury for determination, the bracketed language in the finding portion of the instruction should be utilized.

ALERTS:

• Any person who intentionally destroys or damages, or attempts to destroy or damage, any public utility facility, equipment, or material connected therewith, the destruction or damage of which might, in any manner, threaten the release of radioactive materials or ionizing radiation beyond the areas in which they are normally used or contained, is guilty of a Class 4 felony. Va. Code Ann. § 18.2-162. If the destruction or damage results in the death of another due to exposure to radioactive materials or ionizing radiation, the defendant shall be guilty of a Class 2 felony. If the destruction or damage results in injury to another, the defendant is guilty of a Class 3 felony. Instruction No. 43.500 should therefore be modified accordingly when a nuclear facility is involved under any of the conditions above described.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

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MICHIE'S JURISPRUDENCE, Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

CHAPTER 44

RAPE

Scope Note

Instruction No. 44.100 Rape—General

Instruction No. P44.100 Rape—General

Instruction No. 44.140 Rape—Child Under 13

Instruction No. P44.140 Rape—Child Under 13

Instruction No. 44.160 Carnal Knowledge of Inmate, Parolee, Probationer, Detainee, Pretrial Defendant, or Posttrial Offender

Instruction No. P44.160 Carnal Knowledge of Inmate, Parolee, Probationer, Detainee, Pretrial Defendant, or Posttrial Offender

Instruction No. 44.200 Carnal Knowledge of a Child Between Thirteen and Fifteen Years of Age

Instruction No. P44.200 Carnal Knowledge of a Child Between Thirteen and Fifteen Years of Age

Instruction No. 44.220 Carnal Knowledge—Both Parties Minors

Instruction No. P44.220 Carnal Knowledge—Both Parties Minors

Instruction No. 44.300 Rape—Complaining Witness Mentally Incapacitated or Physically Helpless

Instruction No. P44.300 Rape—Complaining Witness Mentally Incapacitated or Physically Helpless

Instruction No. 44.320 Mentally Incapacitated—Definition

Instruction No. 44.340 Physically Helpless—Definition

Instruction No. 44.400 Attempted Rape

Instruction No. P44.400 Attempted Rape

Instruction No. 44.500 Sexual Intercourse—Definition

Instruction No. 44.600 Element of Force, Threat, or Intimidation

Instruction No. 44.620 Physical Resistance Not Required

Instruction No. 44.700 Defense of Consent

Instruction No. 44.720 Evidence of Previous Acts of Sexual Conduct

Instruction No. 44.800 Age Element

Instruction No. 44.900 Force and Effect of Deposition

SCOPE NOTE

The instructions in this Chapter are limited to the sexual assaults of rape and carnal knowledge of minors and others deemed incapable of legally consenting to sexual acts, or over whom the defendant holds a position of authority. The other types of criminal sexual assaults proscribed under Article 7, Chapter 4, of Title 18.2 are covered in Chapter 48 of this Volume, entitled, "Sexual Offenses." Some sexual offenses involving children are also covered in Chapter 29 of this Volume, entitled, "Family Offenses and Crimes Against Children."

Instruction No. 44.100, based on Va. Code Ann. § 18.2-61, deals with the general crime of rape. Instruction No. 44.140 deals with the rape of a child under the age of 13.

Instruction No. 44.160 covers carnal knowledge of inmates, parolees, probationers, pretrial defendants, or post-trial offenders by employees of and volunteers with correctional facilities and post-release, pretrial, and post-trial programs.

Instruction Nos. 44.200 and 44.220 cover carnal knowledge of child between 13 years of age or older but under 15 years of age, without the use of force, as provided in Va. Code Ann. § 18.2-63. Instruction No. 44.200 covers cases where the defendant is an adult, while Instruction No. 44.220 deals with cases where the defendant is also a minor.

Instruction No. 44.300, based on Va. Code Ann. § 18.2-61, covers sexual intercourse accomplished through the use of the complaining witness's mental incapacity or physical helplessness. Instruction No. 44.320 defines mentally incapacitated, and Instruction No. 44.340 defines physically helpless; both are based on Va. Code Ann. § 18.2-67.10.

Instruction No. 44.400 is confined to the crime of attempted rape.

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Instruction No. 44.700 sets out the defense of consent as a bar to conviction. Instruction No. 44.720 discusses the defense of consent where there is evidence of previous sexual intercourse.

Instruction No. 44.800 covers the age requirements of Va. Code Ann. § 18.2-63, and it includes the requirement that the age of both the defendant and the complaining witness be determined by their actual birth dates.

Instruction No. 44.900, based on Va. Code Ann. § 18.2-67, concerns the "force and effect" of deposition testimony.

See Va. Code Ann. § 18.2-64.1 for the offense of having intercourse with a child who is under the purview of the juvenile court or committed to the state department of corrections.

Instruction No. 44.100

Rape—General

The defendant is charged with the crime of rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [had sexual intercourse with (name of person); caused (name of person) to engage in sexual intercourse with another person]**; and**

(2) That it was against her will and without her consent; and

(3) That it was by force, threat, or intimidation.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.100

Maiming, Killing, or Poisoning Animals

You have found the defendant guilty of the felony of [maiming; killing; poisoning] **an animal.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-144.

CASE AUTHORITY:

Ford v. Commonwealth, 48 Va. App. 262, 266–67, 630 S.E.2d 332, 335 (2006); *Winckler v. Commonwealth, 155 Va. 1146, 1150, 156 S.E. 364, 365 (1931).*

PRACTICE COMMENTARY:

Additional felony offenses. Va. Code Ann. § 18.2-144 also prohibits the shooting, stabbing, wounding, and the like of one's own horse or other livestock with intent to defraud any insurer thereof. If any of those acts and intent are alleged, the elements of the instruction accordingly should be modified. The punishment for those acts is identical to that set forth above.

Additional offense as to fowl and companion animals. Any of the acts prohibited by the statute that are directed against fowl or any companion animal, coupled with any of the various kinds of intent listed in the statute, constitute a Class 1 misdemeanor. A second or subsequent offense involving fowl or a companion animal is a Class 6 felony if the second or subsequent offense or any previous offense resulted in the death of the animal or a licensed veterinarian recommended euthanasia of the animal "upon determination that such euthanasia was necessary due to the condition of the animal, and such condition was a direct result of a violation of this section." Jury instructions have not been provided for those offenses or punishments, but may be created using the format of this instruction as a guide.

☞ ***PRACTICE POINTER:***

Va. Code Ann. § 18.2-144.1 prohibits killing or injuring police animals. A violation is punishable as a Class 5 felony and restitution, including training expenses, is mandatory.

For other statutes criminalizing various acts of cruelty to animals, see Va. Code Ann. §§ 3.2-6570, 3.2-6570.1, 3.2-6571, and 3.2-6573.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Cruelty to Animals" and "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Animals §§ 4, 14, 15; Malicious Mischief §§ 1–6; Poisons and Poisoning §§ 1–2; and Trespass §§ 1, 2, 27

Instruction No. 43.200

Breaking, Injuring, Defacing, Destroying, or Preventing the Operation of Vehicle, Aircraft, or Boat

The defendant is charged with the crime of [breaking; injuring; defacing; destroying; preventing the operation of] [a vehicle; an aircraft; a boat; a vessel]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant individually or in association with one or more persons** [tampered with; injured; broke; removed] [a part of; parts of] [a vehicle; an aircraft; a boat; a vessel]**; and**

(2) **That the act was done for the purpose of** [injuring; defacing; destroying] **the** [vehicle; aircraft; boat; vessel]**; and**

(3) **That the defendant acted willfully.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.200

Breaking, Injuring, Defacing, Destroying or Preventing the Operation of Vehicle, Aircraft, or Boat

You have found the defendant guilty of the crime of [breaking; injuring; defacing; destroying; preventing the operation of] [a vehicle; an aircraft; a boat; a vessel]**.**

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-146.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-146 also prohibits the enumerated acts when done for the purpose of temporarily or permanently preventing the operation of the vehicle, or for any purpose contrary to the will or without the consent of the owner of the vehicle. Maliciously or willfully interfering with or preventing the operation of a vehicle is proscribed by the same section.

Va. Code Ann. § 5.1-22 prohibits the projection of a point of light from a laser, laser gun sight, or any other device simulating a laser at an aircraft. This section also makes it a Class 6 felony to interfere with the operation of any aircraft which endangers the life of the aircraft's operator or any other person.

☞ ***PRACTICE POINTER:***

See Va. Code Ann. § 5.1-16 with regard to tampering with airplanes or markings of airports, landing fields, and other aeronautical facilities.

ALERTS:

• This section does not apply to a bona fide repossession of a vehicle, aircraft, boat, or vessel by the holder of a lien on such vehicle, aircraft, boat, or vessel, or by an agent or employee of the lien holder. See Va. Code Ann. § 18.2-148.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Automobiles § 126.3; Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.250

Willful Disposition or Destruction of Watercraft (Felony)

The defendant is charged with the crime of [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [scuttled; cast away; disposed of; destroyed in any manner] **a** [ship; vessel; watercraft]**; and**

(2) That the defendant did the act with the intent to [injure; defraud] **the owner or any insurer of the** [ship; vessel; watercraft]**; and**

(3) That the defendant acted willfully; and

(4) That the value of the [ship; vessel; watercraft] **or any property on board was $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth proved beyond a reasonable doubt each of the first three elements of the crime as charged, but has failed to prove beyond a reasonable doubt that the value of the [ship; vessel; watercraft; property on board] **was $1,000 or more, then you shall find the defendant guilty of misdemeanor** [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft] **[but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If the Commonwealth has failed to prove any of the first three elements of the crime beyond a reasonable doubt, you shall find the defendant not guilty.

Instruction No. P43.250

Willful Disposition or Destruction of Watercraft (Felony)

You have found the defendant guilty of the felony of [scuttling; casting away; disposing of; destroying] **a** [ship; vessel; watercraft]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-150

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The statute forbids damage to watercraft with the intent of injuring "any property on board the" watercraft, or acts done with the intent to defraud any insurer of the watercraft. Va. Code Ann. § 18.2-150.

If the defendant is found guilty of the misdemeanor offense, substitute Instruction No. 54.700, Class 1 Misdemeanor for Instruction No. P43.250.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Automobiles § 126.3; Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.300

Opening or Carrying Away Containers Used for Dispensing Fuel Oils

The defendant is charged with the crime of [opening; breaking and opening; carrying away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant** [opened; broke and opened; carried away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**; and**

(2) **That the defendant acted with intent to steal** [gasoline; kerosene; motor oil]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

Instruction No. P43.300

Opening or Carrying Away Containers Used for Dispensing Fuel Oils

You have found the defendant guilty of the felony of [opening; breaking and opening; carrying away] [a pump; a tank; equipment; a container] **used for** [dispensing; storing] [gasoline; kerosene; motor oils]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-151.

***CASE AUTHORITY*:**

None.

PRACTICE COMMENTARY:

None.

***ALERTS*:**

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.400

Tampering with Device Designed to Receive Money

The defendant is charged with the crime of tampering with a device designed to receive money. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [entered; forced an entrance into; attempted to force an entrance into; tampered with; inserted any part of an instrument into] **a** [parking meter; vending machine; pay telephone; money changing machine; device designed to receive money]**; and**

(2) **That the defendant intended to steal from this device.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either or both elements of the crime, then you shall find the defendant guilty.

Instruction No. P43.400

Tampering with Device Designed to Receive Money

You have found the defendant guilty of the crime of tampering with a device designed to receive money.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-152.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-152 provides that any subsequent conviction for violation of this section is punished as a Class 6 felony. A prior conviction must be alleged and proven. In such cases, the instruction would need to be revised to add as a third element proof beyond a reasonable doubt of the prior conviction. The finding portion of the instruction would also need to be revised by adding a "waterfall" section that includes the possibility for a finding of guilt on the lesser-included misdemeanor. Finally, the last paragraph of the instruction would need to be revised regarding the elements not proved that would result in a finding of not guilty. Instruction No. 42.180, Escape—Work Release (Jail Inmate) may be used as a guide.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Vandalism"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 8.4

MICHIE'S JURISPRUDENCE, Malicious Mischief §§ 1–6; and Trespass §§ 1, 2, 27

Instruction No. 43.500

Damage to Utility Facility

The defendant is charged with the crime of destroying or damaging a utility facility. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intentionally destroyed or damaged a facility which was used to furnish [oil; telegraph; telephone; electric; gas; sewer; waste-water; water] **service to the public; and**

(2) That the cost to remedy or repair the damage was $1,000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the first element of the crime as charged, but has not proved beyond a reasonable doubt that the cost to remedy or repair the damage was $1,000 or more, then you shall find the defendant guilty of misdemeanor Damage to Utility Facility. [Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a fine of a specific amount, but not more than $500.]

If you find that the Commonwealth has failed to prove beyond a reasonable doubt the first element of the crime, then you shall find the defendant not guilty.

Instruction No. P43.500

Damage to Utility Facility

You have found the defendant guilty of the felony of destroying or damaging a utility facility.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-162.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Pursuant to the provisions of Va. Code Ann. §18.2-162, if the cost to repair or remedy the damage to the facility is less than $1,000, the offense is a Class 3 misdemeanor.

If the defendant opts for jury sentencing, Va. Sup. Ct. R. 3A:17.1(c) requires the court to instruct the jury at the conclusion of all the evidence in the guilt phase of the trial as to punishment with respect to any lesser-included Class 2, 3, or 4 misdemeanor of any charged felony offense. Therefore, if the cost to repair or to remedy the damage is a contested issue to be submitted to the jury for determination, the bracketed language in the finding portion of the instruction should be utilized.

ALERTS:

• Any person who intentionally destroys or damages, or attempts to destroy or damage, any public utility facility, equipment, or material connected therewith, the destruction or damage of which might, in any manner, threaten the release of radioactive materials or ionizing radiation beyond the areas in which they are normally used or contained, is guilty of a Class 4 felony. Va. Code Ann. § 18.2-162. If the destruction or damage results in the death of another due to exposure to radioactive materials or ionizing radiation, the defendant shall be guilty of a Class 2 felony. If the destruction or damage results in injury to another, the defendant is guilty of a Class 3 felony. Instruction No. 43.500 should therefore be modified accordingly when a nuclear facility is involved under any of the conditions above described.

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CHAPTER 44

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SCOPE NOTE

The instructions in this Chapter are limited to the sexual assaults of rape and carnal knowledge of minors and others deemed incapable of legally consenting to sexual acts, or over whom the defendant holds a position of authority. The other types of criminal sexual assaults proscribed under Article 7, Chapter 4, of Title 18.2 are covered in Chapter 48 of this Volume, entitled, "Sexual Offenses." Some sexual offenses involving children are also covered in Chapter 29 of this Volume, entitled, "Family Offenses and Crimes Against Children."

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Instruction No. 44.800 covers the age requirements of Va. Code Ann. § 18.2-63, and it includes the requirement that the age of both the defendant and the complaining witness be determined by their actual birth dates.

Instruction No. 44.900, based on Va. Code Ann. § 18.2-67, concerns the "force and effect" of deposition testimony.

See Va. Code Ann. § 18.2-64.1 for the offense of having intercourse with a child who is under the purview of the juvenile court or committed to the state department of corrections.

Instruction No. 44.100

Rape—General

The defendant is charged with the crime of rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [had sexual intercourse with (name of person); caused (name of person) to engage in sexual intercourse with another person]**; and**

(2) That it was against her will and without her consent; and

(3) That it was by force, threat, or intimidation.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P44.100

Rape—General

You have found the defendant guilty of the crime of rape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than five (5) years.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-61.

Principal Case Authority:

Clifton v. Commonwealth, 22 Va. App. 178, 181–84, 468 S.E.2d 155, 156–58 (1996).

Other Relevant Decisions:

Crawford v. Commonwealth, 281 Va. 84, 105–06, 704 S.E.2d 107, 120 (2011); Gonzales v. Commonwealth, 45 Va. App. 375, 380, 611 S.E.2d 616, 618 (2005); Breeden v. Commonwealth, 43 Va. App. 169, 178–80, 596 S.E.2d 563, 567–69 (2004); Cairns v. Commonwealth, 40 Va. App. 271, 293-96, 579 S.E.2d 340, 351–52 (2003); Benyo v. Commonwealth, 38 Va. App. 650, 654–56, 568 S.E.2d 371, 373–74 (2002); Sabol v. Commonwealth, 37 Va. App. 9, 16–20, 553 S.E.2d 533, 536–38 (2001); Carter v. Commonwealth, 16 Va. App. 118, 127–30, 428 S.E.2d 34, 41–43 (1993); Hoke v. Commonwealth, 237 Va. 303, 310, 377 S.E.2d 595, 599 (1989); Sutton v. Commonwealth, 228 Va. 654, 663, 324 S.E.2d 665, 669–70 (1985).

Practice Commentary: An instruction identical to the model instruction was held to have "properly and fully informed the jury of the elements the Commonwealth was required to prove in order to convict [the defendant] of rape." *Clifton, 22 Va. App. at 184, 468 S.E.2d at 158.*

There is a difference between threat and intimidation. Threat means the expression of an intention to do bodily harm. Intimidation means putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will, and may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure. *Sutton, 228 Va. at 663, 324 S.E.2d at 669–70*; see also *Mohajer v. Commonwealth, 40 Va. App. 312, 322-23, 579 S.E.2d 359, 365 (2003)* (intimidation by psychological pressure); *Myers v. Commonwealth, 11 Va. App. 634, 637, 400 S.E.2d 803, 805 (1991)* (threat to leave victim in remote area). The defendant's implicit threat that he would kill himself if the victim did not have sex with him constituted a threat against "another person" under Va. Code Ann. § 18.2-61 in *Breeden, 43 Va. App. at 179–80, 596 S.E.2d at 568–69.* Carnal knowledge of a child, pursuant to Va. Code Ann. § 18.2-63, is not a lesser-included offense of rape under Va. Code Ann. § 18.2-61. *Ragsdale v. Commonwealth, 38 Va. App. 421, 427–29, 565 S.E.2d 331, 334–35 (2002).*

☞ ***Practice Pointer:***

A lesser included offense instruction for assault and/or battery may be warranted in an attempted rape case. *Richards v. Commonwealth, 161 Va. 1073, 171 S.E. 525*

(1933).

☞ ***PRACTICE POINTER:***

As to admissibility of Sexual Assault Nurse Examiner's (SANE) testimony, see *Wakeman v. Commonwealth, 298 Va. 412, 413, 838 S.E.2d 732, 732 (2020)* (certification as a SANE not required); *Velazquez v. Commonwealth, 263 Va. 95, 103–04, 557 S.E.2d 213, 218 (2002)* (testimony on the ultimate issue not permitted).

☞ ***PRACTICE POINTER:***

For admissibility of other crimes evidence, see *Gonzales, 45 Va. App. at 380, 611 S.E.2d at 618–619* (holding that evidence that an accused committed other crimes is generally inadmissible to prove guilt of the crime they are accused of, but that evidence of similar crimes may be admissible to show the intent or identity of the accused if such are at issue in the case), and *Commonwealth v. Minor, 267 Va. 166, 174–76, 591 S.E.2d 61, 66–67 (2004)* (reiterating the same but also adding that "evidence showing that a defendant raped one or more individuals other than the victim in the crime charged is generally not relevant to the question whether that victim did or did not consent to sexual intercourse with the defendant").

ALERTS:

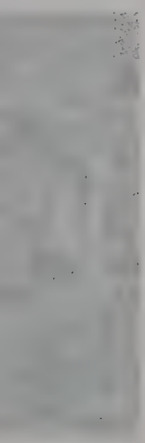
- The governing statute is gender neutral.
- Intercourse with a child under the age of 13 is rape. See Va. Code Ann. § 18.2-61 and Instruction No. 44.140.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27



Instruction No. 44.140

Rape—Child Under 13

The defendant is charged with the crime of rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [had sexual intercourse with (name of child); caused a child to engage in sexual intercourse with (name of person)]**; and**

(2) **That at the time of the act** (name of child) **was under the age of 13.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Rape—Child Under 13

The defendant is charged with the crime of rape. The [Commonwealth] must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant had sexual intercourse with (name of child); caused a child to engage in sexual intercourse with (name of person)]; and

(2) That at the time of the act (name of child) was under the age of 13.

If you find that the [Commonwealth] has proved beyond a reasonable doubt any one or more of the crimes charged, then you must find the defendant guilty.

If you find that the [Commonwealth] has failed to prove beyond a reasonable doubt any one or more of the crimes charged, then you must find the defendant not guilty.

Instruction No. P44.140

Rape—Child Under 13

You have found the defendant guilty of the crime of rape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-61.

CASE AUTHORITY:

Ortiz v. Commonwealth, 276 Va. 705, 713–21, 667 S.E.2d 751, 756–60 (2008); Carpenter v. Commonwealth, 51 Va. App. 84, 99–101, 654 S.E.2d 345, 353–54 (2007); Moore v. Commonwealth, 254 Va. 184, 186–90, 491 S.E.2d 739, 740–43 (1997); McManus v. Commonwealth, 16 Va. App. 310, 312–13, 429 S.E.2d 475, 476–77 (1993); Buzzard v. Commonwealth, 134 Va. 641, 651–55, 114 S.E. 664, 667–68 (1922).

PRACTICE COMMENTARY: A defendant may not invoke the spousal privilege to prevent the disclosure of confidential marital communications in proceedings relating to a criminal sexual assault involving a minor as a victim. See Va. Code Ann. § 19.2-271.2; Va. Sup. Ct. R. 2:504(b); *Carpenter, 51 Va. App. at 89–99, 654 S.E.2d at 48–53.*

An out-of-court complaint by the victim cannot stand alone as independent evidence of the offense but is admissible as corroborative evidence. *McManus, 16 Va. App. at 312, 429 S.E.2d at 475–76.*

ALERTS:

• Va. Code Ann. § 18.2-61(B)(1) provides that when the victim is a child under age 13 and the offender is more than 3 years older than the victim, if the sexual intercourse was done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of Va. Code Ann. § 18.2-47(A) (abduction), Va. Code Ann. § 18.2-48 (abduction with intent to extort, defile, procure prostitution, etc.), Va. Code Ann. §§ 18.2-89, 18.2-90, 18.2-91 (burglary offenses), or Va. Code Ann. § 18.2-51.2 (aggravated malicious wounding), the punishment shall include a mandatory minimum term of confinement of 25 years.

• Va. Code Ann. § 18.2-61(B)(2) also provides that when the victim is a child under age 13 and it is alleged in the indictment that the offender was 18 years of age or older at the time of the offense, the punishment shall include a mandatory minimum term of confinement for life.

• In such instances, the guilt and punishment instructions should be modified accordingly.

• Va. Code Ann. § 18.2-61(B)(2) also provides that in all cases where the victim is a child under age 13 and the offender is more than 3 years older than the victim, if the term of confinement imposed is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. Such a suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape, §§ 1–27

Instruction No. 44.160

Carnal Knowledge of Inmate, Parolee, Probationer, Detainee, Pretrial Defendant, or Posttrial Offender

The defendant is charged with the crime of carnal knowledge of a(n) [person detained or arrested by a law-enforcement officer; inmate; parolee; probationer; juvenile detainee; pretrial defendant; posttrial offender]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime.**

(1) **That the defendant engaged in** [sexual intercourse; cunnilingus; fellatio; anilingus; anal intercourse; animate object sexual penetration; inanimate object sexual penetration] **with** (name of person) **while** (name of person) **was a(n)** [person detained or arrested by a law-enforcement officer; inmate; parolee; probationer; juvenile detainee; pretrial defendant; posttrial offender] [committed to jail; convicted and sentenced to confinement in a state, a local or regional correctional facility or jail; under the jurisdiction of the Department of Corrections; under the jurisdiction of the Department of Juvenile Justice; under the jurisdiction of a secure facility or detention home; under the jurisdiction of a state or local court services unit; under the jurisdiction of a local community-based probation services agency; under the jurisdiction of a pretrial services agency]**; and**

(2) **That the defendant was, at the time he engaged in such** [sexual intercourse; cunnilingus; anilingus; anal intercourse; animate object sexual penetration; inanimate object sexual penetration]**, a(n)** [law-enforcement officer of; employee of; contractual employee of; volunteer with] a [state correctional facility; local correctional facility; the regional jail; the Department of Corrections; the Department of Juvenile Justice; a secure facility or detention home; a state or local court services unit; a local community-based probation program; a pretrial services agency]**; and**

(3) **That the defendant was, at the time he engaged in such** [sexual intercourse; cunnilingus; fellatio; anilingus; anal intercourse; animate object sexual penetration; inanimate object sexual penetration]**, in a position of authority over** (name of person)**; and**

(4) **That the defendant knew that** (name of person) **was under the jurisdiction of a** [state correctional facility; local correctional facility; regional jail; the Department of Corrections; the Department of Juvenile Justice; a secure facility or detention home; a state or local court services unit; a local community-based probation program; pretrial services program]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. [illegible]

Carnal Contents of Inmate, Parole, Pretrial Detention, Pretrial Defendant, or Posttrial Offender

The defendant is charged with the crime of carnal knowledge of and [illegible] prove beyond a reasonable doubt each of the following elements of that crime.

(1) **That the defendant engaged in** [sexual intercourse; cunnilingus; fellatio; anilingus; anal intercourse; animate object sexual penetration; inanimate object sexual penetration] **with** (name of person) **while** (name of person) **was a(n)** [person detained or arrested by a law-enforcement officer; inmate; [illegible] [committed to jail; convicted and sentenced to confinement in a state, a local or regional correctional facility or jail; under the jurisdiction of the Department of Corrections; under the jurisdiction of the Department of Juvenile Justice; under the jurisdiction of a secure facility or detention home; under the [illegible] local community-based probation services agency; under the jurisdiction of a pretrial services agency]; **and**

(2) **That the defendant was, at the time he engaged in such** [sexual intercourse; cunnilingus; anilingus; anal intercourse; animate object sexual [illegible] officer of; employee of; contractual employee of; volunteer with] a [state [illegible] ment of Corrections; the Department of Juvenile Justice; a secure facility or [illegible] probation program; a pretrial services agency]; **and**

(3) **That the defendant was, at the time he engaged in such** [sexual intercourse; cunnilingus; fellatio; anilingus; anal intercourse; animate object sexual penetration; inanimate object sexual penetration], **in a position of authority over** (name of person); **and**

(4) **That the defendant knew that** [illegible] **of a** [state correctional facility; local correctional facility; regional jail; the Department of Corrections; the Department of Juvenile Justice; a secure facility or detention home; a state or local court services unit; a local [illegible]

If you find from the evidence that the Commonwealth has proved beyond a [illegible] **verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P44.160

Carnal Knowledge of Inmate, Parolee, Probationer, Detainee, Pretrial Defendant, or Posttrial Offender

You have found the defendant guilty of the crime of carnal knowledge of a(n) [inmate; parolee; probationer; detainee; pretrial defendant; posttrial offender]**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-64.2.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-64.2 defines carnal knowledge as "includ[ing] the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate or inanimate object sexual penetration."

Va. Code Ann. § 18.2-64.2 also makes carnal knowledge of a pretrial defendant or posttrial offender by an owner or employee of a bail bond company that posted the bond, where the owner or employee has authority to revoke the bond a Class 6 felony.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.200

Carnal Knowledge of a Child Between Thirteen and Fifteen Years of Age

The defendant is charged with the crime of carnal knowledge of a child. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant engaged in** (describe specific act or acts) **with** (name of person)**; and**

(2) **That at the time of the aforementioned acts, the defendant was at least 18 years of age; and**

(3) **That at the time of the aforementioned acts,** (name of person) **was 13 years of age or older but under 15 years of age.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P44.200

Carnal Knowledge of a Child Between Thirteen and Fifteen Years of Age

You have found the defendant guilty of the crime of carnal knowledge of a child.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-63.

CASE AUTHORITY:

Paduano v. Commonwealth, 64 Va. App. 173, 179–81, 766 S.E.2d 745, 748–49 (2014); *Carpenter v. Commonwealth, 51 Va. App. 84, 99–101, 654 S.E.2d 345, 353–54 (2007); Ragsdale v. Commonwealth, 38 Va. App. 421, 427–29, 565 S.E.2d 331, 334–35 (2002); Ashby v. Commonwealth, 33 Va. App. 540, 549, 535 S.E.2d 182, 187 (2000); Shull v. Commonwealth, 16 Va. App. 667, 669–71, 431 S.E.2d 924, 925–26 (1993), aff'd, 247 Va. 161, 440 S.E.2d 133 (1994).*

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-63(C)(ii) defines carnal knowledge as "includ[ing] the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration."

A defendant may not invoke the spousal privilege to prevent the disclosure of confidential marital communications in proceedings relating to a criminal sexual assault involving a minor as a victim. Va. Code Ann. § 19.2-271.2; Va. Sup. Ct. R. 2:504(b); *Carpenter, 51 Va. App. at 89–99, 654 S.E.2d at 348–53.*

Testimony by the victim that she had "sexual relations" with the defendant was too vague to prove carnal knowledge. *Welch v. Commonwealth, 271 Va. 558, 564–65, 628 S.E.2d 340, 343–44 (2006).*

ALERTS:

• This offense is not a lesser included offense of rape. *Ragsdale, 38 Va. App. at 427–29, 565 S.E.2d at 334–35.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.220

Carnal Knowledge—Both Parties Minors

The defendant is charged with the crime of carnal knowledge of a child. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant engaged in** (describe specific act or acts) **with** (name of person); **and**

(2) **That at the time of the** (describe specific act or acts) (name of person) **was 13 years of age or older but under 15 years of age; and**

(3) **That at the time of the** (describe specific act or acts) **the defendant was under the age of 18 years; and**

(4) **That at the time of the** (describe specific act or acts) (name of person) **was 3 or more years younger than the defendant.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you should find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

defendant not guilty.

Instruction No. P44.220

Carnal Knowledge—Both Parties Minors

You have found the defendant guilty of the crime of carnal knowledge.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-63.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-63 defines carnal knowledge as "includ[ing] the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration."

☞ ***PRACTICE POINTER:***

If a consenting child is less than 3 years younger than the minor defendant, the offense is Class 4 misdemeanor. Va. Code Ann. § 18.2-63(B).

ALERTS:

• The penalty instruction for this offense will rarely be used. By definition, a defendant charged with this offense would have been a juvenile at the time of the commission of the offense. Accordingly, upon conviction, the sentence would be imposed by the trial judge, except where the defendant had previously been tried and convicted as an adult. See Va. Code Ann. §§ 16.1-296(C), 16.1-271, 16.1-272(A); *Saunders v. Commonwealth, 281 Va. 448, 452–54, 706 S.E.2d 350, 352–53 (2011).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.300

Rape—Complaining Witness Mentally Incapacitated or Physically Helpless

The defendant is charged with the crime of rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) **That the defendant had sexual intercourse with** (name of person)**; and**

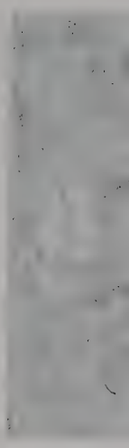
(2) **That at the time** (name of person) **was** [mentally incapacitated; physically helpless]**; and**

(3) **That at the time of the crime, the defendant knew or should have known** (name of person) **was** [mentally incapacitated; physically helpless]**; and**

(4) **That the sexual intercourse was accomplished through the use of the complaining witness's** [mental incapacity; physical helplessness]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.



Instruction No. P44.300

Rape—Complaining Witness Mentally Incapacitated or Physically Helpless

You have found the defendant guilty of the crime of rape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-61, 18.2-67.10(3), (4)

CASE AUTHORITY:

Molina v. Commonwealth, 272 Va. 666, 671–74, 636 S.E.2d 470, 473–75 (2006); Mitchell v. Commonwealth, 41 Va. App. 598, 599–600, 587 S.E.2d 727, 727–28 (2003); White v. Commonwealth, 23 Va. App. 593, 594–97, 478 S.E.2d 713, 713–15 (1996); Howard v. Commonwealth, 21 Va. App. 473, 479–81, 465 S.E.2d 142, 145–46 (1995); Adkins v. Commonwealth, 20 Va. App. 332, 346, 457 S.E.2d 382, 388–89 (1995); Woodward v. Commonwealth, 12 Va. App. 118, 119–22, 402 S.E.2d 244, 244–46 (1991).

PRACTICE COMMENTARY: It will be necessary to define "mentally incapacitated" or "physically helpless" when this instruction is used. See Instruction No. 44.320 defining the former and Instruction No. 44.340 defining the latter term.

ALERTS:

• In a rape prosecution, constructive force exists if the victim could not legally consent to the act. Proof of actual force is not necessary. See *Martin v. Commonwealth, 272 Va. 31, 35, 630 S.E.2d 291, 292 (2006).*

• Lack of consent to the sexual act may be established by force, threat, or intimidation; or it may be established by proof of the victim's mental incapacity or physical helplessness. A jury instruction may combine these alternate theories of proof that the act was committed against the victim's will. See *Davison v. Commonwealth, 298 Va 177, 836 S.E.2d 390 (2019).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.320

Mentally Incapacitated—Definition

Mental incapacity means a condition which (name of person) **had at the time of the crime which prevented her from understanding the nature or consequences of the sexual act involved and about which the defendant knew or should have known.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.10.

CASE AUTHORITY:

Sanford v. Commonwealth, 54 Va. App. 357, 362–65, 678 S.E.2d 842, 845–46 (2009); Molina v. Commonwealth, 272 Va. 666, 673, 636 S.E.2d 470, 474 (2006); Mitchell v. Commonwealth, 41 Va. App. 598, 587 S.E.2d 727 (2003); White v. Commonwealth, 23 Va. App. 593, 597–98, 478 S.E.2d 713, 714–15 (1996); Adkins v. Commonwealth, 20 Va. App. 332, 345–46, 457 S.E.2d 382, 388–89 (1995).

PRACTICE COMMENTARY: This definition applies to the commission of, or the attempt to commit, rape (Va. Code Ann. § 18.2-61), forcible sodomy (Va. Code Ann. § 18.2-67.1), animate or inanimate object sexual penetration (Va. Code Ann. § 18.2-67.2), aggravated sexual battery (Va. Code Ann. § 18.2-67.3), sexual battery (Va. Code Ann. § 18.2-67.4).

The Supreme Court has held that the term "mental incapacity," as used in Va. Code Ann. § 18.2-67.10(3), could "extend to a transitory circumstance such as intoxication if the nature and the degree of the intoxication has gone beyond the stage of merely reduced inhibition and has reached a point where the victim does not understand 'the nature or consequences of the sexual act.' " *Molina, 272 Va. at 673, 636 S.E.2d at 474.*

"When a mentally impaired or mentally retarded person has sufficient cognitive and intellectual capacity to comprehend or appreciate that he or she is engaging in intimate or personal sexual behavior which later may have some effect or residual impact upon the person, upon the person's partner, or upon others, then the person does not have a 'mental incapacity' within the meaning of the statute. If a person is mentally incapacitated but, nevertheless, has the capacity to understand the nature and consequences of the sexual act, which understanding includes the capacity to make a volitional choice to engage or not engage in such an act, then that person's sexual partner has not violated the rape statute merely because a mentally impaired person has made an unwise decision or has chosen to be sexually active." *Adkins, 20 Va. App. at 345–46, 457 S.E.2d at 388–89.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.15.2–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.340

Physically Helpless—Definition

Physical helplessness means that (name of person) [was unconscious; had a condition which rendered her physically unable to communicate an unwillingness to act] **at the time of the crime and it was a condition about which the defendant knew or should have known.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.10.

CASE AUTHORITY:

Howard v. Commonwealth, 21 Va. App. 473, 479–81, 465 S.E.2d 142, 145–46 (1995); Woodward v. Commonwealth, 12 Va. App. 118, 121, 402 S.E.2d 244, 245 (1991).

PRACTICE COMMENTARY: In *Woodward, 12 Va. App. at 121, 402 S.E.2d at 245*, the Court of Appeals held that a victim who was asleep fit the definition of "physically helpless." In *Howard*, the Court of Appeals acknowledged that intoxication could render a victim physically helpless. However, until the victim is so drunk as to be unable to exercise volition over decisions and actions, the victim is not physically unable to communicate. *21 Va. App. at 479–81, 465 S.E.2d at 145–46.*

ALERTS:

• This definition applies to the commission of, or the attempt to commit, rape (Va. Code Ann. § 18.2-61), forcible sodomy (Va. Code Ann. § 18.2-67.1), animate or inanimate object sexual penetration (Va. Code Ann. § 18.2-67.2), aggravated sexual battery (Va. Code Ann. § 18.2-67.3), and sexual battery (Va. Code Ann. § 18.2-67.4).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.400

Attempted Rape

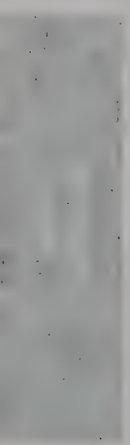
The defendant is charged with the crime of attempted rape. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant had the intent to have sexual intercourse with (name of person) **against her will, without her consent, and by force, threat, or intimidation; and**

(2) The defendant did a direct act beyond mere preparation toward accomplishing the sexual intercourse.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one of the elements of the crime, then you shall find the defendant not guilty.



Instruction No. P44.400

Attempted Rape

You have found the defendant guilty of the crime of attempted rape.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-67.5, 18.2-61.

CASE AUTHORITY:

Siquina v. Commonwealth, 28 Va. App. 694, 700–01, 508 S.E.2d 350, 353–54 (1998); *Wilson v. Commonwealth, 249 Va. 95, 100–02, 452 S.E.2d 669, 673–74 (1995)*; *Fortune v. Commonwealth, 14 Va. App. 225, 416 S.E.2d 25 (1992)*; *Green v. Commonwealth, 223 Va. 706, 711, 292 S.E.2d 605, 608 (1982)*; *Patterson v. Commonwealth, 215 Va. 698, 699, 213 S.E.2d 752, 753 (1975)*; *Chittum v. Commonwealth, 211 Va. 12, 16, 174 S.E.2d 779, 781 (1970)*; *Barrett v. Commonwealth, 210 Va. 153, 156, 169 S.E.2d 449, 451 (1969)*; *Richards v. Commonwealth, 161 Va. 1073, 1076–77, 171 S.E. 525, 526–27 (1933)*; *Glover v. Commonwealth, 86 Va. 382, 385–86, 10 S.E. 420, 421 (1889).*

PRACTICE COMMENTARY: The offense of attempted rape requires a showing both of intent and an overt act. *Fortune, 14 Va. App. at 228, 416 S.E.2d at 27.*

The trier of fact may not rely only on surmise or speculation to find the intent necessary to return a conviction for attempted rape. *Patterson, 215 Va. at 699, 213 S.E.2d at 753.* The specific intent to commit rape may be inferred from conduct if such intent flows naturally from the conduct proven. *Green, 223 Va. at 711, 292 S.E.2d at 608*; *Ingram v. Commonwealth, 192 Va. 794, 804, 66 S.E.2d 846, 851 (1951).*

The overt act must be the commencement of the consummation of the intended offense. *Barrett, 210 Va. at 156, 169 S.E.2d at 451.*

While the act must be more than mere preparation, it need not be the last proximate act to the consummation. *Glover, 86 Va. at 385–86, 10 S.E. at 421.*The evidence need not show that the defendant touched the victim's sexual organs or removed the victim's clothing. *Siquina, 28 Va. App. at 700–01, 508 S.E.2d at 353.*

The acts must be direct overt acts well calculated to accomplish the result intended. *Chittum, 211 Va. at 16–17, 174 S.E.2d at 782*; *Granberry v. Commonwealth, 184 Va. 674, 678, 36 S.E.2d 547, 548 (1946).* However, direct acts that are ineffectual are sufficient. *Siquina, 28 Va. App. at 700–01, 508 S.E.2d at 353–54.*

PRACTICE POINTER:

A lesser included offense instruction for assault and/or battery may be warranted in an attempted rape case. *Richards, 161 Va. at 1076–77, 171 S.E. at 526–27.*

ALERTS:

- The governing statutes are gender neutral.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16, 18.1–18.7

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9; and Rape §§ 1–27

Instruction No. 44.500

Sexual Intercourse—Definition

Sexual intercourse means an actual penetration, no matter how slight, of the defendant's penis into the outer lips of the female sexual organ of (name of person)**. It is not necessary that there be an ejaculation by the male.**

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-61, 18.2-63, 18.2-64.1, and 18.2-64.2.

Case Authority:

Will v. Commonwealth, 31 Va. App. 571, 583, 525 S.E.2d 37, 43 (2000); *Jett v. Commonwealth, 29 Va. App. 190, 194-95, 510 S.E.2d 747, 749 (1999)*; *Moore v. Commonwealth, 254 Va. 184, 186–91, 491 S.E.2d 739, 740–43 (1997)*; *Morrison v. Commonwealth, 10 Va. App. 300, 301, 391 S.E.2d 612, 612 (1990)*; *Spencer v. Commonwealth, 238 Va. 295, 315–16, 384 S.E.2d 785, 798 (1989)*; *Elam v. Commonwealth, 229 Va. 113, 115–16, 326 S.E.2d 685, 686–87 (1985)*; *Strawderman v. Commonwealth, 200 Va. 855, 858, 108 S.E.2d 376, 379 (1959)*; *McCall v. Commonwealth, 192 Va. 422, 426, 65 S.E.2d 540, 542 (1951)*; *Preddy v. Commonwealth, 184 Va. 765, 773–74, 36 S.E.2d 549, 552 (1946)*; *Foster v. Commonwealth, 96 Va. 306, 309–11, 31 S.E. 503, 504–05 (1898).*

Practice Commentary: Va. Code Ann. § 18.2-61 uses the term "sexual intercourse" while Va. Code Ann. §§ 18.2-63, 18.2-64.1, and 18.2-64.2 use the phrase "carnal knowledge."

Virginia courts have consistently held the term "carnal knowledge" to mean "sexual intercourse." *Strawderman, 200 Va. at 858, 108 S.E.2d at 379*; *King v. Commonwealth, 165 Va. 843, 846, 183 S.E. 187, 189 (1936)*. However, the 1993 amendment of Va. Code Ann. §§ 18.2-63, 18.2-64.1, and 18.2-64.2 defines carnal knowledge as "includ[ing] the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration." In each statute, the definition is restricted by the phrase "for the purposes of this section."

The act of sexual intercourse inherently requires an actual penetration to some extent of the male penis into the female sexual organ. *Strawderman, 200 Va. at 858, 108 S.E.2d at 379; McCall, 192 Va. at 426, 65 S.E.2d at 542*. Penetration (sexual intercourse) may be shown by circumstantial evidence. *McCall, 192 Va. at 426, 65 S.E.2d at 542*.

Evidence of genital injury permits at most an inference that a complaining witness was molested and tampered with, not that she was penetrated by a male sexual organ. *Strawderman, 200 Va. at 860, 108 S.E.2d at 380*; *McCall, 192 Va. at 426, 65 S.E.2d at 542*.

Practice Pointer:

Virginia law does not require proof of emission (ejaculation) as an element of rape. *Commonwealth v. Thomas, 3 Va. (1 Va. Cas.) 307, 308 (1812).*

Alerts:

• In *Foster*, the court adopted the common law rule that a male under the age of fourteen (14) was incapable of engaging in sexual intercourse. *96 Va. at 309–11, 31 S.E. at 504–05*. Va. Code Ann. § 18.2-61 creates a rebuttable presumption that

a juvenile over 10 but less than 12 is incapable of violating Va. Code Ann. § 18.2-61. No similar presumption accompanies old age. Thus, a defendant would not be entitled to an instruction granting him a presumption of impotency on the basis of his advanced years. *Preddy, 184 Va. at 773–74, 36 S.E.2d at 552.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.600

Element of Force, Threat, or Intimidation

The element of force, threat, or intimidation required must have been sufficient to overcome any unwillingness on the part of (name of person) **to have sexual intercourse.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-61.

CASE AUTHORITY:

Cairns v. Commonwealth, 40 Va. App. 271, 294–96, 579 S.E.2d 340, 351–52 (2003); *Sabol v. Commonwealth, 37 Va. App. 9, 16–17, 553 S.E.2d 533, 536–37 (2001)*; *Clark v. Commonwealth, 30 Va. App. 406, 409–11, 517 S.E.2d 260, 261–62 (1999)*; *Myers v. Commonwealth, 11 Va. App. 634, 637, 400 S.E.2d 803, 805 (1991)*; *Sutton v. Commonwealth, 228 Va. 654, 663, 324 S.E.2d 665, 669–70 (1985)*; *Jones v. Commonwealth, 219 Va. 983, 984–87, 252 S.E.2d 370, 372–73 (1979)*; *Schrum v. Commonwealth, 219 Va. 204, 208, 246 S.E.2d 893, 896 (1978)*; *Poindexter v. Commonwealth, 213 Va. 212, 216–19, 191 S.E.2d 200, 204–06 (1972)*; *Bradley v. Commonwealth, 196 Va. 1126, 1134–38, 86 S.E.2d 828, 833–35 (1955)*; *Davis v. Commonwealth, 186 Va. 936, 946–50, 45 S.E.2d 167, 171–73 (1947)*; *Mingo v. Commonwealth, 85 Va. 638, 639–41, 8 S.E. 474, 475–76 (1889)*.

PRACTICE COMMENTARY: There is a difference between threat and intimidation. Threat means the expression of an intention to do bodily harm. Intimidation means putting a victim in fear of bodily harm by exercising such domination and control of the victim as to overcome his or her mind and overbear his or her will, and may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure. *Sutton, 228 Va. at 663, 324 S.E.2d at 669–70*; see also *Sabol, 37 Va. App. at 17–18, 553 S.E.2d at 536–37; Myers, 11 Va. App. at 637, 400 S.E.2d at 805.*

ALERTS:

• Intimidation may be shown by the victim's fear of the possibility of bodily injury caused by the sexual assault. *Cairns, 40 Va. App. at 294, 579 S.E.2d at 351.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.620

Physical Resistance Not Required

The Commonwealth need not show that (name of person) **cried out or physically resisted the defendant in order to convict him of the crime for which he is charged, but the absence of such resistance may be considered to show that the act alleged was not against her will.**

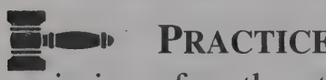
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.6.

CASE AUTHORITY:

Clifton v. Commonwealth, 22 Va. App. 178, 182–84, 468 S.E.2d 155, 157–58 (1996); Gatling v. Commonwealth, 14 Va. App. 60, 63–64, 414 S.E.2d 862, 864–65 (1992); Farish v. Commonwealth, 2 Va. App. 627, 631–32, 346 S.E.2d 736, 738–39 (1986).



PRACTICE COMMENTARY: This instruction applies to either the commission of or the attempt to commit rape, forcible sodomy, animate or inanimate object sexual penetration, aggravated sexual battery, and sexual battery.

ALERTS:

• The statute states that the absence of resistance may be considered only "when relevant" to show that the act alleged was not against the will of the complaining witness. Va. Code Ann. § 18.2-67.6.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.700

Defense of Consent

Consent by (name of person) **is an absolute bar to conviction of rape. If, after consideration of all the evidence, you have a reasonable doubt as to whether** (name of person) **consented to have intercourse with the defendant, then you shall find the defendant not guilty.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Gonzales v. Commonwealth, 45 Va. App. 375, 380–83, 611 S.E.2d 616, 618–20 (2005); *Commonwealth v. Minor, 267 Va. 166, 176, 591 S.E.2d 61, 68 (2004)*; *Clifton v. Commonwealth, 22 Va. App. 178, 181–84, 468 S.E.2d 155, 156–58 (1996)*; *Morse v. Commonwealth, 17 Va. App. 627, 634–38, 440 S.E.2d 145, 151–52 (1994)*; *Myers v. Commonwealth, 11 Va. App. 634, 637-38, 400 S.E.2d 803, 805-06 (1991)*; *Currie v. Commonwealth, 10 Va. App. 204, 207–08, 391 S.E.2d 79, 81 (1990)*; *League v. Commonwealth, 9 Va. App. 199, 209–10, 385 S.E.2d 232, 239 (1989), aff'd on reh'g en banc, 10 Va. App. 428, 392 S.E.2d 510 (1990)*; *Miller v. Commonwealth, 181 Va. 906, 909-10, 27 S.E.2d 57, 58 (1943)*; *Hardyman v. Commonwealth, 153 Va. 954, 968, 151 S.E. 286, 291 (1930)*.

PRACTICE COMMENTARY: Consent is an absolute bar to a finding of guilt to a forcible rape charge where the victim is over the statutorily defined age of unqualified consent. *Mery v. Commonwealth, 12 Va. App. 821, 825–26, 407 S.E.2d 18, 21 (1991); Bryant v. Commonwealth, 216 Va. 390, 393, 219 S.E.2d 669, 672 (1975)*. In *Myers*, the Court of Appeals observed "that it was the victim's state of mind at the time of the attack, not afterward, which determined whether her submission to intercourse was coerced or consensual." *11 Va. App. at 638, 400 S.E.2d at 806*. In *Snyder v. Commonwealth, 220 Va. 792, 796, 263 S.E.2d 55, 57–58 (1980)*, the Supreme Court emphasized that rape can still exist with minimal objective physical resistance so long as the victim subjectively but reasonably believes that resistance would be useless and would cause bodily harm.

The issue of consent concerns only the victim's state of mind. Whether the defendant intended to commit the offense without the victim's consent is not relevant. Evidence that the defendant committed other rapes is not admissible on the issue of consent because it has no tendency to prove that this victim did not consent. *Minor, 267 Va. at 172–76, 591 S.E.2d at 65–68*.

Someone who is doped, drugged, or drunk is not considered capable of consenting to sexual acts under Virginia law. *Miller, 181 Va. at 910, 27 S.E.2d at 58*. See also *Howard v. Commonwealth, 21 Va. App. 473, 479-80, 465 S.E.2d 142, 145 (1995)*.

The defendant is not entitled to this consent instruction if he or she has pleaded an alibi and did not rely upon consent of the victim as a defense at trial. *Hardyman, 153 Va. at 968, 151 S.E. at 291*.

☞ ***PRACTICE POINTER:***

Evidence that the defendant previously committed similar rapes to the one for which he or she is now tried cannot be used to prove the defendant's intent toward the victim. *Gonzales, 45 Va. App. at 380–83, 611 S.E.2d at 618–20*; *Minor, 267 Va.*

at 171–72, 591 S.E.2d at 65.

***ALERTS*:**

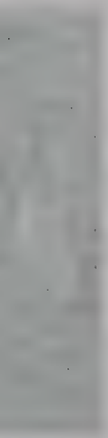
• Va. Code Ann. § 18.2-67.7 limits the admissibility of prior sexual conduct of the complaining witness. But see *Winfield v. Commonwealth, 225 Va. 211, 220, 301 S.E.2d 15, 21 (1983)* (refusing to allow evidence or opinion on the general unchaste character of the complaining witness but allowing evidence tending to show that the individual had a distinct pattern of past sexual conduct); see also *Evans v. Commonwealth, 14 Va. App. 118, 119–20, 415 S.E.2d 851, 852 (1992)* (finding error in the trial court excluding evidence that complaining witness learned she had contracted a venereal disease).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27



Instruction No. 44.720

Evidence of Previous Acts of Sexual Conduct

In considering whether the sexual intercourse was accomplished through force, threat, or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness, you may consider prior acts of sexual conduct with (name of victim) **occurring reasonably near the time of the crime charged.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.7; Va. Sup. Ct. R. 2:412.

CASE AUTHORITY:

Fahringer v. Commonwealth, 70 Va. App. 208, 827 S.E.2d 1 (2019); *League v. Commonwealth, 9 Va. App. 199, 205–06, 385 S.E.2d 232, 236 (1989), aff'd on reh'g en banc, 10 Va. App. 428, 392 S.E.2d 510 (1990).*

PRACTICE COMMENTARY: The use of the phrase "sexual conduct" in the statute suggests a broader range of sexual activities than just prior sexual intercourse, Va. Code Ann. § 18.2-67.7. The term "sexual" as used in this section anticipates the involvement of "intimate parts," which includes "the genitalia, anus, groin, breast, or buttocks of any person." The Court of Appeals therefore held in *Fahringer* that it was not error to refuse to give this instruction where only kissing, and no "sexual conduct," took place. *70 Va. App. at 218, 827 S.E.2d at 6*; Va. Code Ann. § 18.2-67.10.

ALERTS:

• The statute limits consideration of prior sexual conduct between the defendant and the victim to the issue of whether the rape was accomplished by force, threat, or intimidation, or through the use of the complaining witness's mental incapacity of physical helplessness. Va. Code Ann. § 18.2-67.7. The statute further provides that it does not prevent "the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge." Va. Code Ann. § 18.2-67.7(B).

• Although the statute does not state that prior sexual conduct between the defendant and the victim can be considered on the separate issue of consent, the Court of Appeals has allowed the use of evidence of prior sexual conduct between the defendant and the victim to support the defense of consent. *League, 9 Va. App. at 205–06, 385 S.E.2d at 236.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.800

Age Element

In this case, [the age of (name of person) at the time of the alleged sexual intercourse; the age(s) of (name of person) and the defendant at the time of the alleged sexual intercourse] **is an essential element of the crime. In your consideration of this, the actual date of birth is controlling.**

Even if the defendant did not know the actual age of (name of person)**, for any reason at all, that is not a defense to this charge.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-63.

CASE AUTHORITY:

Rainey v. Commonwealth, 169 Va. 892, 894–95 193 S.E. 501, 502 (1937); Lawrence v. Commonwealth, 71 Va. (30 Gratt.) 845, 855 (1878).

PRACTICE COMMENTARY: The statute provides that, when calculating whether such child is 3 years or more a junior of the minor accused of carnal knowledge of a child between thirteen and fifteen years of age, "the actual dates of birth of the child and the accused, respectively, shall be used." Va. Code Ann. § 18.2-63. In other contexts involving the question of age, case law appears to accept without question the principle that the date of birth determines the age.

ALERTS:

• The defendant's mistaken belief as to the victim's age, no matter how formulated, is not available as a defense to a defendant charged with rape. See *Lawrence, 71 Va. at 855.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

Instruction No. 44.900

Force and Effect of Deposition

In this case, you have heard the deposition of (name of person) **read to you. You should consider this as having the same force and effect as though the testimony had been given orally in Court.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.

CASE AUTHORITY:

Setliff v. Commonwealth, 162 Va. 805, 811–12, 173 S.E. 517, 519 (1934).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-67 allows for the deposition of the complaining witness in cases involving criminal sexual assault and attempted criminal sexual assault.

ALERTS:

The consent of the accused in open court is required for such depositions to be taken. Va. Code Ann. § 18.2-67.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.7, 5.10, 5.13–5.16

MICHIE'S JURISPRUDENCE, Rape §§ 1–27

CHAPTER 45

RECKLESS DRIVING, SPEEDING AND ELUDING

Scope Note

Instruction No. 45.100 Reckless Driving

Instruction No. P45.100 Reckless Driving

Instruction No. 45.110 Reckless Driving—On Suspended or Revoked License—Causing Death of Another

Instruction No. P45.110 Reckless Driving—On Suspended or Revoked License—Causing Death of Another

Instruction No. 45.200 Speeding—Calibration

Instruction No. 45.250 Speeding—Radar

Instruction No. 45.300 Disregarding Signal by Law Enforcement Officer to Stop

Instruction No. P45.300 Disregarding Signal by Law Enforcement Officer to Stop

Instruction No. 45.310 Affirmative Defense—Defendant Reasonably Believed Pursuer was Not a Law Enforcement Officer

SCOPE NOTE

Instruction No. 45.100 relates to reckless driving as defined in Va. Code Ann. § 46.2-852.

The general penalty for reckless or improper driving is set forth in Va. Code Ann. §§ 46.2-868 and 46.2-869. Other statutes (Va. Code Ann. §§ 46.2-853 to 46.2-865) enumerate specific instances of reckless driving.

Instruction 45.110 relates to reckless driving that is the proximate cause of the death of another while the defendant's operator's license is suspended due to a moving violation. The penalty for committing that offense is a Class 6 felony. Va. Code Ann. § 46.2-868(B).

Maximum and minimum speed limits are set forth in Va. Code Ann. §§ 46.2-870 to 46.2-878.2 and Va. Code Ann. § 46.2-881. Except as set forth in Va. Code Ann. § 46.2-862, violation of speed restrictions does not constitute reckless driving per se. Such violations are punishable as traffic infractions under Va. Code Ann. § 46.2-113.

Accuracy of a speedometer is often at issue in speeding cases. Instruction No. 45.200, based on Va. Code Ann. § 46.2-942, addresses the use of the results of a calibration test of the accuracy of a speedometer.

Instruction No. 45.250 on radar checking of speed is based on Va. Code Ann. § 46.2-882, which also authorizes measurement of speed by a laser speed detection device or microcomputer. Va. Code Ann. § 46.2-1079 prohibits instruments on motor vehicles to detect the presence of radar, laser or other device or mechanism employed by law-enforcement personnel to measure the speed of motor vehicles upon highways.

Instruction No. 45.300 addresses disregarding a law enforcement officer's signal to stop. It is based on Va. Code Ann. § 46.2-817. Instruction No. 45.310 should be given in conjunction with Instruction No. 45.300 if the defendant presents the affirmative defense set forth in Va. Code Ann. § 46.2-817(A) or (B) that he reasonably believed he was being pursued by a person other than a law-enforcement officer. Whether or not the affirmative defense set forth in Va. Code Ann. § 46.2-817(B) also is applicable to an alleged violation of subsection (C) has not been ruled upon by the appellate courts. See the Practice Commentary to Instruction Nos. 45.300 and 45.310 for a discussion of this issue.

Instruction No. 45.100

Reckless Driving

The defendant is charged with the crime of reckless driving. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was driving a vehicle on a highway; and

(2) That he [was driving in a manner so as to endanger the life, limb or property of any person; name action prohibited by Va. Code Ann. § 46.2-853 to § 46.2-865].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of reckless driving, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P45.100

Reckless Driving

You have found the defendant guilty of the crime of reckless driving.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 46.2-852–46.2-865, 46.2-868.

Case Authority:

Blevins v. Commonwealth, 63 Va. App. 628, 635, 762 S.E.2d 396, 399 (2014); Robinson v. Commonwealth, 48 Va. App. 623, 631, 633 S.E.2d 737, 741 (2006), rev'd in part on other grounds, 274 Va. 45, 645 S.E.2d 470 (2007); Crest v. Commonwealth 40 Va. App. 165, 174–75, 578 S.E.2d 88, 92–93 (2003); Hall v. Commonwealth, 25 Va. App. 352, 353, 488 S.E.2d 651, 652 (1997); Kennedy v. Commonwealth, 1 Va. App. 469, 472–73, 339 S.E.2d 905, 907–08 (1986); Delawder v. Commonwealth, 214 Va. 55, 58, 196 S.E.2d 913, 915 (1973); Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970); Dykeman v. Commonwealth, 201 Va. 807, 810, 113 S.E.2d 867, 869–70 (1960).

Practice Commentary: Va. Code Ann. § 46.2-852 defines reckless driving as driving "recklessly or at a speed or in a manner so as to endanger the life, limb or property of any person."

Factors Tending to Show Recklessness. "Factors tending to show recklessness include erratic driving, the likelihood of injury to other users of the highway, lack of control of the vehicle, driving in excess of the speed limit, dangerous driving behavior, intoxication, and noncompliance with traffic markers." *Blevins, 63 Va. App. at 635, 762 S.E.2d at 399.* In addition, "fall[ing] asleep while operating an automobile manifests a disregard by the driver for the consequences of his act and an indifference to life, limb or property sufficient to find the operator guilty of the offense of reckless driving." *Kennedy, 1 Va. App. at 473, 339 S.E.2d at 908.*

Speeding. It should be emphasized that speeding does not necessarily constitute reckless driving. The word "recklessly" as used in the statute imparts a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property. Speed alone is not a violation of this statute but only becomes so when it endangers life, limb or property. *Robinson, 48 Va. App. at 631, 633 S.E.2d at 741; Powers, 211 Va. at 388, 177 S.E.2d at 630.*

Alcohol Odor. The odor of alcohol alone is not sufficient to convict a person of reckless driving. *Bacon v. Commonwealth, 220 Va. 766, 768, 263 S.E.2d 390, 391 (1980).* Although intoxication may be a factor bearing on proof of reckless driving, it does not, of itself, prove reckless driving. *Thompson v. Commonwealth, 27 Va. App. 720, 724, 501 S.E.2d 438, 440 (1998).*

Exculpatory Statements. If the defendant's exculpatory statement or testimony is not contradicted and it is not incredible or unworthy of belief, and there is no other explanation of the accident, it is not reckless driving. *Bacon, 220 Va. at 768–69, 263 S.E.2d at 391–92.*

Reckless Driving Per Se. Specific acts that also constitute reckless driving are set forth in Va. Code Ann. §§ 46.2-853 to 46.2-865. When the offense charged is a violation of one of these sections, the instruction should be modified accordingly.

—DUI. Charges for reckless driving and driving under the influence could easily arise out of the same activity or occurrence. Although the two offenses are not identical, Va. Code Ann. § 19.2-294.1 provides that whenever any person is charged with a violation of Va. Code Ann. § 18.2-266 (driving a motor vehicle while intoxicated) and Va. Code Ann. § 46.2-852 (reckless driving) growing out of the same act or acts and is convicted of one of these charges, the court is required to dismiss the remaining charge. *Lawson v. Commonwealth, 61 Va. App. 292, 295, 734 S.E.2d 714, 715 (2012)*; *Harris v. City of Virginia Beach, 19 Va. App. 214, 216, 450 S.E.2d 401, 402 (1994); Padgett v. Commonwealth, 220 Va. 758, 760–61, 263 S.E.2d 388, 389–90 (1980).* Va. Code Ann. § 19.2-294.1, however, does not prevent convictions of reckless driving by speed under Va. Code Ann. § 46.2-862 and driving under the influence arising out of the same acts. *White v. Commonwealth, 26 Va. App. 410, 414, 494 S.E.2d 896, 897–98 (1998).*

—Racing. Virginia Code Ann. § 46.2-865 punishes the racing of two or more vehicles as reckless driving. The term "race" under the statute has been interpreted as a "contest of speed between two or more vehicles." *Doggett v. Commonwealth, 66 Va. App. 219, 783 S.E.2d 555 (2016).*

—Excessive Speed. Driving at a rate of speed exceeding that rate which is reasonable under the circumstances and traffic conditions at the time, regardless of any posted speed limit, is punishable as reckless driving. Va. Code Ann. § 46.2-861. Also, exceeding the speed limit by twenty miles per hour or more, or driving in excess of eighty-five miles per hour, regardless of the speed limit, is reckless driving. Va. Code Ann. § 46.2-862.

Lesser Included Offenses. In *Blevins, 63 Va. App. at 640–41, 762 S.E.2d at 402*, the Court concluded that there is no statutory framework for instructing the jury on improper driving. The Court held that, based upon Va. Code Ann. § 46.2-869, the culpability determination for improper driving was the exclusive prerogative of the trial court. *Blevins, 63 Va. App. at 636–37, 762 S.E.2d at 400.* The Court expressly declined to rule on the question of whether improper driving is a lesser included offense of general reckless driving. *Id. at 637 n.2, 762 S.E.2d at 400 n.2.*

Improper driving is not a lesser included offense of reckless driving by speed. There is a requirement of slight culpability for improper driving which is not an element of reckless driving by speed. *Chibikom v. Commonwealth, 54 Va. App. 422, 426, 680 S.E.2d 295, 297 (2009).*

The Court also stated that:

> The plain and unambiguous reading of the improper driving statute makes clear that authority rests with the trial judge and not the jury to make the lesser degree of culpability determination. In the alternative, an attorney for the Commonwealth may reduce a reckless driving charge to improper driving at any time prior to the court's decision. Thus, only the trial judge, or the prosecutor before the verdict is rendered, has the prerogative to reduce a reckless driving charge to improper driving under Code § 46.2-869.

Id. at 426–27, 680 S.E.2d at 297.

In the same way, reckless driving should be distinguished from involuntary manslaughter. Both of these offenses can arise out of the same occurrence. In this case, though, since the lesser crime is not included within the other and since there is no statutory bar to conviction for both offenses, prosecution and conviction for both will be sustained. *Dykeman, 201 Va. at 810, 113 S.E.2d at 869–70; Delawder, 214 Va. at 58, 196 S.E.2d at 915.*

☞ ***PRACTICE POINTER:***

"Highway" is defined in Va. Code Ann. § 46.2-100 and has been interpreted to include ways on private property that are open to public use for vehicular travel. For a discussion of what constitutes a "highway", see *Seaborn v. Commonwealth, 54 Va. App. 408, 410–11, 679 S.E.2d 565, 566–67 (2009).*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles § 123

Instruction No. 45.110

Reckless Driving—On Suspended or Revoked License—Causing Death of Another

Guilt Phase:

The defendant is charged with the crime of reckless driving on a [suspended; revoked] **license, causing the death of another. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant was driving a vehicle on a highway;

(2) That he [was driving in a manner so as to endanger the life, limb, or property of any person; name action prohibited by Va. Code Ann. § 46.2-853 to § 46.2-865];

(3) That he was driving without a valid operator's license due to a [suspension; revocation] **for a moving violation; and**

(4) That his reckless driving was the sole and proximate cause of the death of another.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of reckless driving on a [suspended; revoked] **license causing the death of another, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) and (2) of the above elements of the crime charged, but has not proved beyond a reasonable doubt either or both of elements (3) and (4), then you shall find the defendant guilty of reckless driving, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of elements (1) and (2) of the crime, then you shall find the defendant not guilty.

Instruction No. P45.110

Reckless Driving—On Suspended or Revoked License—Causing Death of Another

Felony:

You have found the defendant guilty of the crime of reckless driving on a [suspended; revoked] **license causing the death of another.**

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specified amount, but not more than $2,500.; or

(4) Confinement in jail for a specified time, but not more than twelve (12) months, and a fine of a specified amount, but not more than $2,500.

Misdemeanor:

You have found the defendant guilty of the crime of reckless driving.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

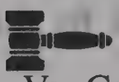
SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 46.2-852, 46.2-868(A), 46.2-868(B).

CASE AUTHORITY:

Chapman v. Commonwealth, 68 Va. App. 131, 804 S.E. 2d 326 (2017), aff'd without opinion, 296 Va. 386, 820 S.E. 2d 611 (2018).



PRACTICE COMMENTARY: Reckless driving is a class 1 misdemeanor. Va. Code Ann. § 46.2-868(A). Reckless driving that causes the death of another person as a sole and proximate result of the reckless driving, when committed by a driver whose license is invalid due to suspension or revocation, is a class 6 felony. Va. Code Ann. § 46.2-868(B).

Causation—Sole and Proximate Cause: The use of the phrase "proximate result" in Va. Code Ann. § 46.2-868(B) creates a causation element. *Chapman, 68 Va. App. at 138, 804 S.E. 2d at 330.* Specifically, that phrase limits the application of the statute to the subset of cases where the defendant's reckless driving constitutes the sole **and** proximate cause of the resulting death. In Virginia, the principles applicable to a finding of proximate cause are constant throughout their civil and criminal contexts. Not every factor that contributes to an accident, injury or other result is a proximate cause. *Id. at 140–42, 804 S.E. 2d at 331.*

The court in *Chapman* concluded that the failure of the victim to wear a seat belt was not a proximate cause of his death for the purposes of Va. Code Ann. § 46.2-868(B). The defendant's reckless driving therefore was left as the sole and proximate cause of the accident and resulting death. *Id. at 145, 804 S.E.2d at 333.*

For an instruction on "Proximate Cause", see Instruction No. 2.530, Definition of Proximate Cause.

Va. Code Ann. § 46.2-865.1 covers injury or death of another while engaging in a race. In the case of injury to an innocent bystander, the offense is punishable as a Class 6 felony. In the case of death of another, the punishment is a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

Reckless driving by a person whose operator's license has been suspended or revoked because of a second or subsequent conviction of DUI within ten years of the prior violation is also a felony. Va. Code Ann. § 46.2-391. This instruction can be modified to cover a prosecution for felony reckless driving under that statute. In *Jasper v. Commonwealth, 49 Va. App. 749, 757, 644 S.E.2d 406, 411 (2007)*, the Virginia Court of Appeals held that the admission of appellant's DMV transcript in a prosecution for felony reckless driving under Va. Code Ann. § 46.2-391 did not violate the Confrontation Clause of the Sixth Amendment to the United States

Constitution.

☞ ***PRACTICE POINTER:***

See Practice Commentary to Instruction No. 45.100, Reckless Driving.

ALERTS:

• Specific acts constituting reckless driving are set forth in Va. Code Ann. §§ 46.2-853 through 46.2-865. When the underlying reckless driving offense charged is a violation of one of those sections, the instruction should be modified accordingly.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles § 122

Instruction No. 45.200

Speeding—Calibration

You have received the results of a calibration test of the accuracy of the speedometer in the motor vehicle operated by [the defendant; the arresting officer]. You should consider such results and give them such weight as you deem proper under the facts and circumstances of this case in determining guilt or innocence and, if you find the defendant guilty, in fixing punishment.

Sources & Authority

Governing Statute:

Va. Code Ann. § 46.2-942.

Case Authority:

Williams v. Commonwealth, 5 Va. App. 514, 519, 365 S.E.2d 340, 342–43 (1988).

Practice Commentary:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, Criminal Offenses and Defenses in Virginia, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 21.1–21.9

Michie's Jurisprudence, Automobiles § 126.1

Instruction No. 45.250

Speeding—Radar

The determination of the speed of the defendant's automobile by [radar; laser device; microcomputer device] is sufficient to prove his guilt unless other evidence raises a reasonable doubt as to whether the defendant in fact exceeded a speed of (lawful maximum speed) **miles per hour.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 46.2-882.

CASE AUTHORITY:

Gray v. Commonwealth, 18 Va. App. 663, 666, 446 S.E.2d 480, 482 (1994); Untiedt v. Commonwealth, 18 Va. App. 836, 838–39, 447 S.E.2d 537, 538 (1994); Scafetta v. Arlington County, 13 Va. App. 646, 649, 414 S.E.2d 438, 440 (1992); Myatt v. Commonwealth, 11 Va. App. 163, 166, 397 S.E.2d 275, 276–77 (1990); Williams v. Commonwealth, 5 Va. App. 514, 519, 365 S.E.2d 340, 342–43 (1988).

PRACTICE COMMENTARY: Va. Code Ann. § 46.2-882 authorizes measurement of speed by a laser detection device or microcomputer as well as by radar. The statute directs that the results of such speed determinations shall be prima facie evidence of a vehicle's speed. The statute also contains provisions related to determining the accuracy of the measurement device.

An expert witness may contest a particular radar reading but may not contest the use of radar as a device for measuring the speed of a motor vehicle. *Myatt, 11 Va. App. at 166, 397 S.E.2d at 277.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles § 126.1

Instruction No. 45.300

Disregarding Signal by Law Enforcement Officer to Stop

The defendant is charged with the crime of disregarding a signal by law-enforcement officer to stop. The Commonwealth must prove beyond a reasonable doubt each of the following elements of the crime:

(1) That the defendant received a visible or audible signal from law-enforcement officer to bring his motor vehicle to a stop; and

(2) That the defendant drove such motor vehicle in a willful and wanton disregard of such signal so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P45.300

Disregarding Signal by Law Enforcement Officer to Stop

You have found the defendant guilty of the crime of disregarding a signal by law-enforcement officer to stop.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. § 46.2-817.

Case Authority:

Johnson v. Commonwealth, 70 Va. App. 45, 824 S.E.2d 14 (2019); *Jones v. Commonwealth, 64 Va. App. 361, 768 S.E.2d 270 (2015)*; *Phelps v. Commonwealth, 275 Va. 139, 142–43, 654 S.E.2d 926, 928 (2008)*; *Coleman v. Commonwealth, 52 Va. App. 19, 24, 660 S.E.2d 687, 689–90 (2008)*; *Bazemore v. Commonwealth, 42 Va. App. 203, 218, 590 S.E.2d 602, 609 (2004)*; *Tucker v. Commonwealth, 38 Va. App. 343, 347, 564 S.E.2d 144, 146–47 (2002)*.

Practice Commentary: These instructions cover the class 6 felony offense set forth in Va. Code Ann. § 46.2-817(B). If the offense charged is a misdemeanor, then the instructions should be drafted in accordance with subsection (A) of Va. Code Ann. § 46.2-817, the punishment for which is a class 2 misdemeanor. If the offense charged is based upon a pursuit resulting in the death of a law-enforcement officer, then the instructions should be drafted in accordance with subsection (C) of Va. Code Ann. § 46.2-817, the punishment for which is a class 4 felony.

Affirmative Defense—Primary Offense Charged as a Violation of Va. Code Ann. § 46.2-817(A) or (B). Va. Code Ann. § 46.2-817(A) and (B) each provide that it shall be an affirmative defense if the defendant shows he reasonably believed he was being pursued by a person other than a law-enforcement officer. If the defendant raises the affirmative defense, Instruction No. 45.310, Affirmative Defense—Defendant Reasonably Believed Pursuer was Not a Law Enforcement Officer, should be given.

Affirmative Defense—Primary Offense Charged as a Violation of Va. Code Ann. § 46.2-817(C). Va. Code Ann. § 46.2-817(C) (death of a law-enforcement officer directly and proximately resulting from a pursuit as a result of a violation of subsection (B)) does not expressly address whether or not the affirmative defense set forth in subsection (B) is applicable to its provisions. An argument can be made, however, that it is incorporated by the express reference in subsection (C) to "a violation of subsection (B)." To date, there is no appellate guidance. Instruction No. 45.310, Affirmative Defense—Defendant Reasonably Believed Pursuer was Not a Law Enforcement Officer, may be used when a violation of subsection (C) is charged and the court is of the opinion that the affirmative defense is applicable.

When defendant ignored police officer's signal to stop, operated his car in gross violation of posted speed limits, disregarded a red traffic signal, lost control of the car, and crashed into a tree, he clearly endangered both the officer in the discharge of his duties and others on or about the highway. *Tucker, 38 Va. App. at 347, 564 S.E.2d at 146–47.*

Because the term "a person" in subsection (B) of Va. Code Ann. § 46.2-817

meant any individual human being, the term encompassed the entire universe of people, including defendant; therefore, defendant was "a person" within the meaning of the statute and defendant's endangerment of himself was sufficient evidence to support defendant's conviction under that statute where defendant's speed and driving, losing control of the vehicle, crossing over the oncoming lane of traffic, striking a ditch on the left-hand side of the road and overturning the vehicle, endangered defendant's person. *Phelps, 275 Va. at 142–43, 654 S.E.2d at 928.*

Where a rational fact finder could have found that defendant's driving, after a police officer's command to stop, endangered defendant as well as any others on the road that night, it was irrelevant that defendant did not hurt anyone by his driving. What mattered was that he put himself and everyone else on the road in serious danger of being injured or killed. *Coleman, 52 Va. App. at 24–26, 660 S.E.2d at 690–91.*

When the trial court erroneously instructed the jury that the Commonwealth had to prove defendant willfully or wantonly disregarded an officer's signal, rather than proving defendant willfully and wantonly disregarded the signal, under Va. Code Ann. § 46.2-817, the ends of justice exception to Va. Sup. Ct. R. 5A:18 did not allow the appellate court to consider defendant's argument that he was entitled to a reversal of his conviction for feloniously eluding police. The evidence that defendant "willfully and wantonly" disregarded an officer's signal, so as to "endanger any person" was overwhelming; he never contested the elements of "willfulness" or "wantonness" at trial, and the erroneous instruction did not allow the jury to convict defendant of otherwise innocent behavior. *Bazemore, 42 Va. App. at 223–24, 590 S.E.2d at 611–12.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles § 126.2

Instruction No. 45.310

Affirmative Defense—Defendant Reasonably Believed Pursuer was Not a Law Enforcement Officer

If you find from the evidence that the defendant has shown he reasonably believed he was being pursued by a person other than a law-enforcement officer, then you shall find the defendant not guilty of disregarding a signal by a law-enforcement officer to stop.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 46.2-817(A) and (B).

CASE AUTHORITY:

Johnson v. Commonwealth, 70 Va. App. 45, 824 S.E.2d 14 (2019).

PRACTICE COMMENTARY:

Primary Offense Charged as a Violation of Va. Code Ann. § 46.2-817(A) or (B). Va. Code Ann. § 46.2-817(A) and (B) each provide that it shall be an affirmative defense if the defendant shows he reasonably believed he was being pursued by a person other than a law-enforcement officer. If the defendant raises the affirmative defense, this instruction should be given in conjunction with Instruction No. 45.300, Disregarding Signal by Law Enforcement Officer to Stop.

Primary Offense Charged as a Violation of Va. Code Ann. § 46.2-817(C). Va. Code Ann. § 46.2-817(C) (death of a law-enforcement officer directly and proximately resulting from a pursuit as a result of a violation of subsection (B)) does not expressly address whether or not this affirmative defense is applicable to its provisions. An argument can be made, however, that it is incorporated by the express reference in subsection (C) to "a violation of subsection (B)." To date, there is no appellate guidance. This instruction may be used when a violation of subsection (C) is charged and the court is of the opinion that the affirmative defense is applicable.

State of Mind. Testimony relevant to the defendant's state of mind and subjective belief regarding his pursuer at the time of the offense may be presented by the defense. Johnson, 70 Va. App. at 50, 824 S.E.2d at 16.

Expert Testimony Inadmissible Absent Insanity Defense. Expert testimony about the defendant's mental state at the time of the offense, however, is inadmissible at trial unless the defendant presents an insanity defense. Id. at 53, 824 S.E 2d at 18.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Drunk Driving and Related Offenses" and "Motor Vehicles (Title 46.2)"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 21.1–21.9

MICHIE'S JURISPRUDENCE, Automobiles § 126.1

CHAPTER 46

RIOT, UNLAWFUL ASSEMBLY, AND OBSTRUCTION

Scope Note

Instruction No. 46.100 Riot—General
Instruction No. P46.100 Riot—General
Instruction No. 46.120 Riot—Carrying Firearm or Other Dangerous Weapon
Instruction No. P46.120 Riot—Carrying Firearm or Other Dangerous Weapon
Instruction No. 46.140 Riot—Incitement to Participate
Instruction No. P46.140 Riot—Incitement to Participate
Instruction No. 46.160 Riot—Conspiracy
Instruction No. P46.160 Riot—Conspiracy
Instruction No. 46.200 Unlawful Assembly—General
Instruction No. P46.200 Unlawful Assembly—General
Instruction No. 46.300 Riot or Unlawful Assembly—Remaining After Warning
Instruction No. 46.320 Riot or Unlawful Assembly—Damage to Property
Instruction No. P46.320 Riot or Unlawful Assembly—Damage to Property
Instruction No. 46.340 Riot or Unlawful Assembly—Injury to Persons
Instruction No. P46.340 Riot or Unlawful Assembly—Injury to Persons
Instruction No. 46.400 Riot—Definition
Instruction No. 46.420 Unlawful Assembly—Definition
Instruction No. 46.500 Obstruction—Free Passage of Others
Instruction No. P46.500 Obstruction—Free Passage of Others
Instruction No. 46.520 Obstruction—Resisting Execution of Legal Process
Instruction No. P46.520 Obstruction—Resisting Execution of Legal Process

SCOPE NOTE

These instructions cover the principal offenses relating to riot, unlawful assembly, and obstruction.

Instruction Nos. 46.100 through 46.160 deal with the crime of riot. The first two instructions are based on Va. Code Ann. § 18.2-405. Instruction No. 46.100 covers the general elements of the offense, which is punishable as a Class 1 misdemeanor. Instruction No. 46.120 is limited to cases where the defendant is carrying a firearm or other dangerous weapon while rioting, an offense punishable as a Class 5 felony. Instruction Nos. 46.140 and 46.160 are based on Va. Code Ann. § 18.2-408. Instruction No. 46.140 covers the crime of directing, inciting, or soliciting other persons to participate in a riot. Instruction No. 46.160 is confined to the crime of conspiracy to riot.

Instruction No. 46.200 is used in cases where the defendant is charged with unlawful assembly. The instruction is based on Va. Code Ann. § 18.2-406.

Instruction Nos. 46.300 through 46.340 apply to crimes that can be committed in situations that entail either an unlawful assembly or a riot. Instruction No. 46.300 deals with cases where the defendant remains at a place of riot or unlawful assembly after having been warned to disperse. This instruction is based on Va. Code Ann. §§ 18.2-407 and 18.2-411. Instruction No. 46.320 is limited to the crime of damaging property while unlawfully or riotously assembled, while Instruction No. 46.340 covers the offense of injuring another person while unlawfully or riotously assembled. These two latter instructions are based on Va. Code Ann. § 18.2-414. Instruction Nos. 46.400 and 46.420 provide the two definitions that are central to the offenses covered by Instruction Nos. 46.300 through 46.340. Instruction No. 46.400, based on Va. Code Ann. § 18.2-405, defines the term "riot." Instruction No. 46.420, based on Va. Code Ann. § 18.2-406, defines an "unlawful assembly."

Instruction No. 46.500 and Instruction No. 46.520 deal with offenses of obstruction. Instruction No. 46.500, based on Va. Code Ann. § 18.2-404, covers the crime of obstructing the free passage of others. Instruction No. 46.520, based on Va. Code Ann. § 18.2-409, is limited to defendants who resist or obstruct the execution of legal process. Although these two offenses often occur during riots or unlawful assemblies, it is important to note that they are not confined to these two situations. Thus, they may be used in cases that do not involve riots or unlawful assemblies.

Instruction No. 46.100

Riot—General

The defendant is charged with the crime of participating in a riot. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant acted together with two or more other persons in the unlawful use of force or violence; and

(2) That the force or violence seriously jeopardized the public safety, peace, or order.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.100

Riot—General

You have found the defendant guilty of the crime of participating in a riot.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-405; 18.2-11.

CASE AUTHORITY:

Corbett v. Commonwealth, 210 Va. 304, 306-07, 171 S.E.2d 251, 252-53 (1969); Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969).

PRACTICE COMMENTARY: "[P]resence alone is not enough to support a conviction" under Va. Code Ann. § 18.2-405. *Jones, 210 Va. at 303, 170 S.E.2d at 782*. The police arrested a group of about thirty people, including Jones. Members of the group were yelling and cursing as they walked down the street. When the police surrounded the group, several bottles, pieces of brick, and two knives were dropped on the ground. No one identified the defendant as being one of the persons who were yelling and cursing or as possessing any of the articles found on the ground. There was no evidence the defendant had joined the crowd for any unlawful purpose. Therefore, the Court held that the evidence was insufficient to sustain a conviction.

☞ ***PRACTICE POINTER:***

In *Owens v. Commonwealth, 211 Va. 633, 635, 179 S.E.2d 477, 479 (1971)*, the Court held that the common law definition of unlawful assembly expressly requires clear and present danger of violent conduct.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.120

Riot—Carrying Firearm or Other Dangerous Weapon

The defendant is charged with the crime of participating in a riot while carrying a firearm or other deadly or dangerous weapon. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant acted together with two or more other persons in the unlawful use of force or violence; and**

(2) **That the force or violence seriously jeopardized the public safety, peace, or order; and**

(3) **That at the time the defendant carried a** [firearm; deadly or dangerous weapon, namely (describe item)]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.120

Riot—Carrying Firearm or Other Dangerous Weapon

You have found the defendant guilty of the crime of participating in a riot while carrying a firearm or other deadly or dangerous weapon.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-405; 18.2-10.

CASE AUTHORITY:

Corbett v. Commonwealth, 210 Va. 304, 306–07, 171 S.E.2d 251, 252-53 (1969); Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-405 does not define "firearm." For a discussion of the different definitions of "firearm" applicable in prosecutions arising under Va. Code Ann. §§ 18.2-56.1 and 18.2-308.2, see the Case Authority and Practice Commentary to Instruction 18.940, Definition of Firearm—Reckless Handling of a Firearm.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.140

Riot—Incitement to Participate

The defendant is charged with the crime of directing, inciting, or soliciting other persons who participate in a riot to acts of force or violence. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant directed, incited, or solicited other persons to acts of force or violence; and

(2) That the other persons participated in a riot.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.140

Riot—Incitement to Participate

You have found the defendant guilty of the crime of directing, inciting, or soliciting other persons who participate in a riot to acts of force or violence.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-408; 18.2-10.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The instruction that covers the definition of riot should be given in conjunction with this instruction. See Instruction No. 46.400, Riot—Definition.

ALERTS:

• This instruction has been drafted to extend beyond defendants who are already participating in a riot. It contemplates the defendant who induces acts of force and violence by a person who will later participate in a riot. It is not clear, however, whether the governing statute will be construed in accordance with this instruction. The governing statute could be interpreted only to mean the defendant must direct, incite, or solicit persons who are actually participating in a riot.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation" and "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1–9; Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.160

Riot—Conspiracy

The defendant is charged with the crime of conspiracy to cause or produce a riot. The Commonwealth must prove beyond a reasonable doubt that the defendant conspired with others to cause or produce a riot.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P46.160

Riot—Conspiracy

You have found the defendant guilty of the crime of conspiracy to cause or produce a riot.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-408; 18.2-10.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Instruction No. 46.400, Riot—Definition should be given in conjunction with this instruction.

See also the instructions on conspiracy in Chapter 14.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation" and "Conspiracy"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Attempts and Solicitations §§ 1-9; Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.200

Unlawful Assembly—General

The defendant is charged with the crime of unlawful assembly. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant assembled with two or more other persons; and

(2) That the defendant shared with the two or more other persons a common intent to advance some purpose, whether lawful or unlawful; and

(3) That the purpose was to be accomplished by the commission of an act or acts of unlawful force or violence; and

(4) That the force or violence was likely to jeopardize seriously public safety, peace, or order; and

(5) That the assembly actually tended to create in persons of ordinary courage a well-grounded fear of serious and immediate breaches of public safety, peace, or order.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. But you shall not fix the punishment until your verdict has been received and recorded.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.200

Unlawful Assembly—General

You have found the defendant guilty of the crime of unlawful assembly.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-406; 18.2-11.

CASE AUTHORITY:

Corbett v. Commonwealth, 210 Va. 304, 306–07, 171 S.E.2d 251, 252–53 (1969); Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969).

PRACTICE COMMENTARY: "[P]resence alone is not enough to support a conviction" under this governing statute. *Jones, 210 Va. at 303, 170 S.E.2d at 782*. For a more detailed discussion of *Jones,* see the practice commentary to Instruction No. 46.100, Riot—General.

Va. Code Ann. § 18.2-406 has been held not to impermissibly infringe First Amendment rights. *United Steelworkers of America v. Dalton, 544 F. Supp. 282, 288-89 (E.D. Va. 1982).*

ALERTS:

• For an assembly to be unlawful requires a "clear and present danger of violent conduct." *Owens, 211 Va. at 637, 179 S.E.2d at 480.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.300

Riot or Unlawful Assembly—Remaining After Warning

The defendant is charged with the crime of remaining at a place of [riot; unlawful assembly] **after a warning to disperse. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That there was [a riot; an unlawful assembly]; **and**

(2) That the defendant was present at the place of the [riot; unlawful assembly]**; and**

(3) That the defendant was warned to disperse in the name of the State by [the Sheriff; a deputy sheriff; a police official of (name of county, city, or town)]; and

(4) That the defendant remained in the place of the [riot; unlawful assembly] **after being warned to disperse.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty and fix his punishment at a fine of a specific amount, but not more than $500.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 18.2-407; 18.2-405; 18.2-406; 18.2-411; 18.2-11.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: It will be necessary to use this instruction with Instruction Nos. 46.400 or 46.420, which define "riot" and "unlawful assembly" respectively.

In addition to a deputy, a sheriff, or a police officer, Va. Code Ann. §18.2-411 provides that "any assigned militia" may give the lawful warning to disperse. This was omitted from the instruction in order to prepare a simpler model; and because the warning in most instances will be given by the officials named in the instruction.

ALERTS:

• Va. Code Ann. § 18.2-407 does not apply to the "owner or lessee of the premises, his family and nonrioting guests, and public officers and persons assisting them."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.320

Riot or Unlawful Assembly—Damage to Property

The defendant is charged with the crime of damaging property while unlawfully or riotously assembled. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was unlawfully or riotously assembled; and

(2) That the defendant [pulled down, damaged, or destroyed; began to pull down, damage, or destroy; assisted in pulling down, damaging, or destroying] **a** [dwelling house; building].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.320

Riot or Unlawful Assembly—Damage to Property

You have found the defendant guilty of the crime of damaging property while unlawfully or riotously assembled.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-414; 18.2-405; 18.2-406; 18.2-10.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: It will be necessary to use this instruction with Instruction Nos. 46.400 or 46.420, which define "riot" and "unlawful assembly" respectively.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.340

Riot or Unlawful Assembly—Injury to Persons

The defendant is charged with the crime of injuring another person while unlawfully or riotously assembled. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant was unlawfully or riotously assembled; and

(2) That with premeditation, the defendant caused any injury to another person.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.340

Riot or Unlawful Assembly—Injury to Persons

You have found the defendant guilty of the crime of injuring another person while unlawfully or riotously assembled.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-414; 18.2-405; 18.2-406; 18.2-10.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Instruction Nos. 46.400 or 46.420, which define "riot" and "unlawful assembly" respectively, should be given in conjunction with this instruction.

In most cases, the instruction can be made more specific by inserting the name of the person who was injured. However, the statute does not appear to require the Commonwealth to ascertain the name of the particular person who was injured by the defendant.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.400

Riot—Definition

Riot is any unlawful use, by three or more persons acting together, of force or violence which seriously jeopardizes the public safety, peace, or order.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-405.

CASE AUTHORITY:

Corbett v. Commonwealth, 210 Va. 304, 306–07, 171 S.E.2d 251, 252–53 (1969); *Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969).*

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.420

Unlawful Assembly—Definition

Whenever three or more persons, gathered together, share the common intent to advance some purpose, whether lawful or unlawful, by the commission of an act or acts of unlawful force or violence likely to jeopardize seriously public safety, peace, or order, and the assembly actually tends to create in persons of ordinary courage a well-grounded fear of serious and immediate breaches of public safety, peace, or order, then the gathering together is an unlawful assembly.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-406.

CASE AUTHORITY:

Corbett v. Commonwealth, 210 Va. 304, 306–07, 171 S.E.2d 251, 252–53 (1969); Jones v. Commonwealth, 210 Va. 299, 302–03, 170 S.E.2d 779, 782 (1969).

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.500

Obstruction—Free Passage of Others

The defendant is charged with the crime of obstructing free passage of others. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the location was [a public place; private property open to the public]**; and**

(2) That the defendant unreasonably or unnecessarily obstructed the free passage of other persons to, from, or within such [place; property]**; and**

(3) That the defendant had been requested to cease such obstruction or to move on; and

(4) That the request was made by [a duly authorized law enforcement officer; the owner or his agent or employee; the lessee or his agent or employee]**; and**

(5) That the defendant failed or refused to cease any such obstruction or to move on.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P46.500

Obstruction—Free Passage of Others

You have found the defendant guilty of the crime of obstructing free passage of others.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-404; 18.2-11.

CASE AUTHORITY:

Juares v. Commonwealth, 26 Va. App. 154, 158, 493 S.E.2d 677, 679 (1997).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-404 specifically states that it is not to be construed to prohibit lawful picketing.

Va. Code Ann. § 18.2-404 requires defendant to have obstructed the free passage of other persons either "unreasonably" or "unnecessarily," which requires an examination of the facts and circumstances of each case. *Juares, 26 Va. App. at 158, 493 S.E.2d at 679.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Riot and Unlawful Assembly"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 53.3

MICHIE'S JURISPRUDENCE, Breach of the Peace § 2; Constitutional Law § 78; and Mobs, Riots and Lynchings §§ 1–4

Instruction No. 46.520

Obstruction—Resisting Execution of Legal Process

The defendant is charged with the crime of resisting or obstructing execution of legal process. The Commonwealth must prove beyond a reasonable doubt that the defendant acted jointly or in combination with another person to resist or obstruct the execution of legal process, namely (describe the kind of process obstructed).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find the Commonwealth has failed to prove the crime beyond a reasonable doubt, then you shall find the defendant not guilty.

Instruction No. P46.520

Obstruction—Resisting Execution of Legal Process

You have found the defendant guilty of the misdemeanor of resisting execution of legal process.

Upon consideration of all of the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-409; 18.2-11.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: While this offense is often committed in cases that involve rioting or unlawful assembly, it is not limited to such situations. Thus, the instruction should be used in any cases where the defendant is charged with resisting or obstructing the execution of legal process.

ALERTS:

• For a statute governing similar conduct, see Va. Code Ann. § 18.2-460 and Instruction No. 35.100, Obstructing Justice (Law Enforcement Officer).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Interfering with Justice"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 27.1, 27.8

MICHIE'S JURISPRUDENCE, Obstructing Justice §§ 1–2

CHAPTER 47

ROBBERY

Scope Note

Instruction No. 47.100 Robbery—General

Instruction No. P47.100 Robbery—General

Instruction No. 47.100(a) Robbery that Caused Serious Bodily Injury to, or the Death of, any Other Person

Instruction No. P47.100(a) Robbery that Caused Serious Bodily Injury to, or the Death of, Any Other Person (for robberies committed after July 1, 2021)

Instruction No. 47.100(b) Robbery Committed by Using or Displaying a Firearm in a Threatening manner

Instruction No. P47.100(b) Robbery Committed by Using or Displaying a Firearm in a Threatening Manner (for robberies committed after July 1, 2021)

Instruction No. 47.100(c) Robbery Using Physical Force not Resulting in Serious Bodily Injury, or Robbery by Using or Displaying a Deadly Weapon Other than a Firearm in a Threatening Manner

Instruction No. P47.100(c) Robbery—Punishment for a Robbery by Using Physical Force and Which Did Not Result in Serious Bodily Injury (for robberies committed after July 1, 2021)

Instruction No. 47.100(d) Simple Robbery—Robbery Using Threats or Intimidation or Robbery by any Other Means not Involving a Deadly Weapon

Instruction No. P47.100(d) Robbery—Punishment for a Simple Robbery—Committed by Using Threats or Intimidation or Robbery by Any Other Means not Involving a Deadly Weapon (for robberies committed after July 1, 2021)

Instruction No. 47.150 Definition of "Serious Bodily Injury"

Instruction No. 47.160 Definition of a "firearm"

Instruction No. 47.170 Definition of a "Deadly Weapon"

Instruction No. 47.200 Carjacking

Instruction No. P47.200 Carjacking

SCOPE NOTE

Instruction No. 47.100 is a general instruction on robbery that applies to robberies committed before July 1, 2021 and incorporates the range of punishment applicable before the statute, Va. Code Ann. § 18.2-58, was amended. Instruction Nos. 47.100(a) through (d) set forth the instructions for the four gradations of robbery following the amendment of the statute. Corresponding punishment instructions are provided in the event the defendant elects to be sentenced by a jury. Instruction No. 47.150 defines serious bodily injury. Instruction No. 47.160 defines a "firearm" for purposes of this Chapter. Instruction No. 47.170 defines "serious bodily injury." Instruction No. 47.200, based on Va. Code Ann. § 18.2-58.1, covers the crime of carjacking.

Instruction No. 47.100

Robbery—General

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intended to steal; and**

(2) **That the defendant took** (describe personal property)**; and**

(3) **That the taking was from** (name of person) **or in his presence; and**

(4) **That the taking was against the will of the owner or possessor; and**

(5) **That the taking was accomplished by** [violence to the person; intimidation of the person; the threat of serious bodily harm; the threat or presenting of a firearm; the threat or presenting of a deadly weapon].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

NOTE: This punishment instruction should be used for robberies committed before July 1, 2021.

of the person; the threat of serious bodily harm; the threat or presenting of a firearm; the threat or presenting of a deadly weapon).

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt all of the elements required to be proved [by any one of the alternative counts] that the defendant [is guilty] and that the punishment will [not] exceed confinement in jail for twelve months and a fine of $2,500, but that the verdict has been returned and further evidence has been heard by you,

defendant not guilty.

NOTE: This punishment instruction should be used for offenses committed before July 1, 2021.

Instruction No. P47.100

Robbery—General

You have found the defendant guilty of the crime of robbery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than five (5) years.

NOTE: This punishment instruction should be used for robberies committed before July 1, 2021.

Instruction No. 47.100(a)

Robbery that Caused Serious Bodily Injury to, or the Death of, any Other Person

The defendant is charged with the crime of robbery that caused serious bodily injury to, or the death of, any other person. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intended to steal; and**

(2) **That the defendant took** (describe personal property)**; and**

(3) **That the taking was from** (name of person) **or in his presence; and**

(4) **That the taking was against the will of the owner or possessor; and**

(5) **That the taking was accomplished by** [violence to the person; intimidation of the person; the threat of serious bodily harm; the threat or presenting of a firearm; the threat or presenting of a deadly weapon]; **and**

(6) **That in committing the robbery, the defendant caused serious bodily injury to, or the death of, any other person.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery that caused serious bodily injury to, or the death of, any other person [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) through (5) of the crime but not element (6), then you shall find the defendant guilty of simple robbery [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements (1) through (5) of the crime, then you shall find the defendant not guilty.

Instruction No. P47.100(a)

Robbery that Caused Serious Bodily Injury to, or the Death of, Any Other Person
(for robberies committed after July 1, 2021)

You have found the defendant guilty of the crime of a robbery that caused serious bodily injury to, or the death of any other person. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(a) Imprisonment for life or for any term of imprisonment of not less than 20 years and a fine of not more than $100,000; or

(b) Imprisonment for life or for any term of imprisonment of not less than 20 years.

PERSON

(for robberies committed after July 1, 2021)

Instruction No. 47.100(b)

Robbery Committed by Using or Displaying a Firearm in a Threatening manner

The defendant is charged with the crime of robbery committed by using or displaying a firearm in a threatening manner. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intended to steal; and**

(2) **That the defendant took** (describe personal property)**; and**

(3) **That the taking was from** (name of person) **or in his presence; and**

(4) **That the taking was against the will of the owner or possessor; and**

(5) **That the taking was accomplished by** [violence to the person; intimidation of the person; the threat of serious bodily harm]; **and**

(6) **That the robbery was committed by using or displaying a firearm in a threatening manner.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery committed by using or displaying a firearm in a threatening manner [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) through (5) of the crime but not element (6), then you shall find the defendant guilty of simple robbery [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements (1) through (5) of the crime, then you shall find the defendant not guilty.

Robbery — Committed by Using or Displaying a Firearm or a Dangerous Weapon

47.100(3) ROBBERY

The defendant is charged with the crime of robbery committed by using or displaying a firearm [or a dangerous weapon]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant intended to steal; and

(2) That the defendant took (describe personal property); and

(3) That the taking was from (name of person) or in his presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by [violence to the person; intimidation of the person; the threat of serious bodily harm]; and

(6) That the defendant was assisted by using or displaying a firearm [a dangerous weapon] in committing the crime.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime charged, then you shall find the defendant guilty of robbery committed by using or displaying a firearm in a threatening manner [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) through (5) of the crime but not element (6), then you shall find the defendant guilty of simple robbery [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt one or more of the elements (1) through (5) of the crime, then you shall find the defendant not guilty.

Instruction No. P47.100(b)

Robbery Committed by Using or Displaying a Firearm in a Threatening Manner
(for robberies committed after July 1, 2021)

You have determined that the defendant is guilty of committing a robbery committed by using or displaying a firearm in a threatening manner. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(a) Imprisonment for a term not less than 5 years nor more than 20 years and a fine of not more than $100,000; or

(b) Imprisonment for a term not less than 5 years nor more than 20 years.

Instruction No. 47.100(c)

Robbery Using Physical Force not Resulting in Serious Bodily Injury, or Robbery by Using or Displaying a Deadly Weapon Other than a Firearm in a Threatening Manner

The defendant is charged with the crime of robbery using physical force not resulting in serious bodily injury, or robbery by using or displaying a deadly weapon other than a firearm in a threatening manner. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intended to steal; and**

(2) **That the defendant took** (describe personal property)**; and**

(3) **That the taking was from** (name of person) **or in his presence; and**

(4) **That the taking was against the will of the owner or possessor; and**

(5) **That the taking was accomplished by** [violence to the person; intimidation of the person; the threat of serious bodily harm]**; and**

(6) **That the robbery was committed**[using physical force not resulting in serious bodily injury; using or displaying a deadly weapon other than a firearm in a threatening manner]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery[by using physical force not resulting in serious bodily injury; using or displaying a deadly weapon other than a firearm in a threatening manner][**but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) through (5) of the crime but not element (6), then you shall find the defendant guilty of simple robbery [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements (1) through (5) of the crime, then you shall find the defendant not guilty.

(1) That the defendant intended to steal; and

(2) That the defendant took (describe personal property); and

(3) That the taking was from (name of person) or in his presence; and

(4) That the taking was against the will of the owner or possessor; and

(5) That the taking was accomplished by [violence to the person; intimidation of the person; the threat of serious bodily harm]; and

(6) That the robbery was committed[using physical force not resulting in serious bodily injury; using or displaying a deadly weapon other than a firearm in a threatening manner; or displaying a firearm or what [he] [she] reasonably believed to be a firearm].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery[by using physical force not resulting in serious bodily injury; using or displaying a deadly weapon other than a firearm in a threatening manner;][but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt elements (1) through (5) of the crime but not element (6), then you shall find the defendant guilty of simple robbery [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements [(1) through (5)] that you must find [the defendant guilty],

Instruction No. P47.100(c)

Robbery—Punishment for a Robbery by Using Physical Force and Which Did Not Result in Serious Bodily Injury (for robberies committed after July 1, 2021)

You have determined that the defendant is guilty of committing a robbery by using physical force and which did not result in serious bodily injury, or robbery by using or displaying a deadly weapon other than a firearm in a threatening manner. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(a) Imprisonment for a term not less than one year nor more than 10 years; or

(b) Confinement in a jail for not more than 12 months and/or a fine of not more than $2,500.

(a) Imprisonment for a term not less than one year nor more than 10 years; or

(b) Confinement in a jail for not more than 12 months and/or a fine of not more than $2,500.

Instruction No. 47.100(d)

Simple Robbery—Robbery Using Threats or Intimidation or Robbery by any Other Means not Involving a Deadly Weapon

The defendant is charged with the crime of robbery by using threats or intimidation or robbery by any other means not involving a deadly weapon. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant intended to steal; and**

(2) **That the defendant took** (describe personal property)**; and**

(3) **That the taking was from** (name of person) **or in his presence; and**

(4) **That the taking was against the will of the owner or possessor; and**

(5) **That the taking was accomplished by**[using threats or intimidation; any other means not involving a deadly weapon]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of robbery[using threats or intimidation; any other means not involving a deadly weapon]**. [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements (1) through (5) of the crime, then you shall find the defendant not guilty.

Instruction No. P47.100(d)

Robbery—Punishment for a Simple Robbery—Committed by Using Threats or Intimidation or Robbery by Any Other Means not Involving a Deadly Weapon (for robberies committed after July 1, 2021)

You have determined the defendant is guilty of committing a robbery by using threats or intimidation or robbery by any other means not involving a deadly weapon. Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(a) Imprisonment for a term not less than one year nor more than five years; or

(b) Confinement in jail for not more than 12 months and/or a fine of not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-58.

Case Authority:

Fagan v. Commonwealth, 63 Va. App. 395, 398, 758 S.E.2d 78, 80 (2014); *Dean v. Commonwealth, 61 Va. App. 209, 216–18, 734 S.E.2d 673, 677–78 (2012)*; *Price v. Commonwealth, 59 Va. App. 764, 767–70, 722 S.E.2d 653, 654–56 (2012)*; *Williams v. Commonwealth, 278 Va. 633, 637–39, 685 S.E.2d 178, 180–82 (2009)*; *Mills v. Commonwealth, 52 Va. App. 214, 216–18, 662 S.E.2d 637, 638–39 (2008)*; *Commonwealth v. Hudgins, 269 Va. 602, 606, 611 S.E.2d 362, 365 (2005)*; *Commonwealth v. Jones, 267 Va. 284, 287, 591 S.E.2d 68, 70 (2004)*; *Seaton v. Commonwealth, 42 Va. App. 739, 748–51, 595 S.E.2d 9, 13–14 (2004)*; *Spencer v. Commonwealth, 42 Va. App. 443, 448–49, 592 S.E.2d 400, 402–03 (2004)*; *Clay v. Commonwealth, 30 Va. App. 254, 258–60, 516 S.E.2d 684, 685–86 (1999)*; *Chappelle v. Commonwealth, 28 Va. App. 272, 274–75, 504 S.E.2d 378, 379 (1998)*; *Jones v. Commonwealth, 26 Va. App. 736, 738–39, 496 S.E.2d 668, 669–70 (1998)*; *Broady v. Commonwealth, 16 Va. App. 281, 288–89, 429 S.E.2d 468, 472–73 (1993)*; *Jones v. Commonwealth, 13 Va. App. 566, 572, 414 S.E.2d 193, 196 (1992)*; *Briley v. Commonwealth, 221 Va. 532, 543, 273 S.E.2d 48, 55 (1980)*; *Johnson v. Commonwealth, 215 Va. 495, 496, 211 S.E.2d 71, 72 (1975)*; *Durham v. Commonwealth, 214 Va. 166, 168–69, 198 S.E.2d 603, 605–06 (1973)*; *Mason v. Commonwealth, 200 Va. 253, 254–56, 105 S.E.2d 149, 150–51 (1958)*.

Practice Commentary: The court has consistently ruled that statutes governing robbery punish the crime rather than define it. *Johnson, 215 Va. at 496, 211 S.E.2d at 72; Hudgins, 269 Va. at 606, 611 S.E.2d at 365*. It is therefore necessary to look to the common law to determine the elements of the crime. *Johnson, 215 Va. at 496, 211 S.E.2d at 72*. Robbery is defined at common law to be "the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation." *Mason, 200 Va. at 254, 105 S.E.2d at 150*. Thus, the distinctive elements of robbery are the use of violence, or the threat thereof, and the theft of property from the person or in the presence of the victim. *Briley, 221 Va. at 543, 273 S.E.2d at 55*; *Jones, 26 Va. App. at 738–39, 496 S.E.2d at 669–70*; *Broady, 16 Va. App. at 288–89, 429 S.E.2d at 472–73*.

Effective July 1, 2021, the General Assembly has created four classes of robbery:

1. Any person who commits robbery and causes serious bodily injury to or the death of any other person is guilty of a Class 2 felony.
2. Any person who commits robbery by using or displaying a firearm, as defined in § 18.2-308.2:2, in a threatening manner is guilty of a Class 3 felony.
3. Any person who commits robbery by using physical force not resulting in

serious bodily injury or by using or displaying a deadly weapon other than a firearm in a threatening manner is guilty of a Class 5 felony.

4. Any person who commits robbery by using threats or intimidation or any other means not involving a deadly weapon is guilty of a Class 6 felony.

A number of decisions from the United States Supreme Court, including *Apprendi v. New Jersey, 530 U.S. 466 (2000)* and *Alleyne v. United States, 570 U.S. 99 (2013)*, parse the distinction between sentencing factors, which may be found by a judge, and the elements of an offense, which must be charged and proved to a judge or jury beyond a reasonable doubt. Instructions are provided for each of the four gradations of robbery. The instructions presuppose that the distinguishing fact mentioned in Virginia Code Ann. § 18.2-58(1) through (3) is an element of the offense that must be charged and proved beyond a reasonable doubt. No appellate decision has construed the 2021 amendments to the robbery statute to determine whether they constitute sentencing factors or elements of the offense. The remaining offense, Virginia Code Ann. § 18.2-58(4), is referred to as simple robbery because it does not require proof of an additional fact beyond the common law definition of robbery. Corresponding punishment instructions are provided, in the event the defendant elects to be sentenced by a jury.

Punishment when the prosecution charges multiple theories of robbery

Under settled law,

> [t]he state may, under one or multiple indictments, charge a defendant using multiple theories concerning the same crime or greater and lesser crimes arising out of the same act or transaction. When so prosecuted, the accused cannot be subjected to more than one conviction and punishment for each discrete criminal act.

Claggett v. Commonwealth, 252 Va. 79, 95 (1996) (citations omitted). If a "defendant has been convicted on multiple charges based on the same facts . . . double jeopardy considerations may compel the Commonwealth to elect which charge to submit to the [judge or] jury for the imposition of a sentence." *Lawlor v. Commonwealth, 285 Va. 187, 223 n.11 (2013)* (citing *Andrews v. Commonwealth, 280 Va. 231, 287–88 & n.19 (2010)*).

Taking. Taking is "securing dominion or absolute control of the property. The absolute dominion must exist at some time, though it be only momentary." *Green v. Commonwealth, 133 Va. 695, 699, 112 S.E. 562, 563 (1922)*; *Beard v. Commonwealth, 19 Va. App. 359, 362–63, 451 S.E.2d 698, 700 (1994)*. The degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight. *Durham, 214 Va. at 168, 198 S.E.2d at 606* (finding the evidence sufficient for robbery even though nothing had been actually taken from the house, but a television set and a chair in the living room had been moved from their usual places).

Intent. The intent to steal means the intent to permanently deprive the owner of his property. *Pierce v. Commonwealth, 205 Va. 528, 532–33, 138 S.E.2d 28, 31*

(1964). Evidence of intent to use and abandon the property of another without returning it is evidence of the requisite intent. *Slater v. Commonwealth, 179 Va. 264, 267, 18 S.E.2d 909, 910–11 (1942)* (larceny case). See *Quintana v. Commonwealth, 224 Va. 127, 139, 295 S.E.2d 643, 648 (1982)*, where circumstantial evidence of intent was held to be sufficient.

The intent to rob must be present at the time of the taking and may be inferred from the facts and circumstances surrounding the taking. *Durham, 214 Va. at 169, 198 S.E.2d at 606*. The intent to commit robbery need not exist for any particular length of time and may occur momentarily. *Id.*

It is immaterial that the victim is dead when the theft occurs, so long as the violence which occasioned the victim's death was for the purpose of taking the victim's property. *Patterson v. Commonwealth, 222 Va. 653, 664, 283 S.E.2d 212, 219 (1981)*. See also *Whitley v. Commonwealth, 223 Va. 66, 73, 286 S.E.2d 162, 166 (1982)*. Intent to steal formed after the victim has been killed for a different reason supports a conviction for larceny only. *Shepperson v. Commonwealth, 19 Va. App. 586, 591–92, 454 S.E.2d 5, 8 (1995)*.

The intent to steal is lacking when the property is taken to prevent harm to a third person, even though force or intimidation is used to accomplish the taking. *Jones v. Commonwealth, 172 Va. 615, 619–20, 1 S.E.2d 300, 301–02 (1939)*. Criminal intent is also lacking when the taking is to enforce payment of a debt or under an honest, though mistaken, claim of right. *Pierce, 205 Va. at 533, 138 S.E.2d at 31–32*.

Property and Value. Personal property is anything of value. However, distinct proof of a specific value is not necessary. A description of the property showing it to be of some value is sufficient. *Pierce, 205 Va. at 532, 138 S.E.2d at 31*; see also *Simpson v. Commonwealth, 227 Va. 557, 567, 318 S.E.2d 386, 392 (1984)*. The Commonwealth need not prove ultimate ownership of the property taken, but only that the victim's possessory rights were superior to that of the defendant's. *Hairston v. Commonwealth, 2 Va. App. 211, 217, 343 S.E.2d 355, 358–59 (1986)*; *Jones, 13 Va. App. at 572 n.3, 414 S.E.2d at 196 n.3*.

From the Person or in the Presence of the Victim. Property taken from a room in the victim's home while the victim was detained in another room satisfies the element of a taking in the presence of the victim. *Price, 59 Va. App. at 769–70, 722 S.E.2d at 655–56*. In *Durham, 214 Va. at 168, 198 S.E.2d at 605–06*, the court similarly applied the phrase "of property from the person or in the presence of the victim" broadly to include the taking of property from the custody or the constructive possession of another.

The Supreme Court also has rejected "out of hand the notion that because the taking occurs minutes after the victim is killed, the taking is not from the 'person.'" *Patterson, 222 Va. at 664, 283 S.E.2d at 219*. The Court noted that for purposes of the common law definition, a corpse is a "person" if "the taking occurs minutes after the victim is killed." *Id.*

Violence, Threats, Intimidation or Fear. "Violence or force requires a physical touching or violation of the victim's person. . . . Threat requires an overt expression, by words or conduct, of a present intention to commit an immediate act of violence or force against the victim. . . . Intimidation results when the words or conduct of the accused exercise such domination and control over the victim as to . . . plac[e] the victim in fear of bodily harm." *Bivins v. Commonwealth, 19 Va. App. 750, 752–53, 454 S.E.2d 741, 742 (1995)*; see *Jones, 26 Va. App. at 738–39, 496 S.E.2d at 669–70.*

Even if the victim testifies that he had no fear, the Court held in *Chappelle* that the fact that the defendant displayed a firearm was sufficient because robbery is established through violence or fear. *28 Va. App. at 275, 504 S.E.2d at 379*; see also *Seaton, 42 Va. App. at 754–55, 595 S.E.2d at 16–17.*

Fear of bodily harm "must result from the words or conduct of the accused rather than the temperamental timidity of the victim." *Harris v. Commonwealth, 3 Va. App. 519, 521, 351 S.E.2d 356, 357 (1986).* However, there is no requirement in Virginia that the "fear" induced by the defendant's intimidating words or conduct be judged by an objective standard of reasonableness. *Id. at 522, 351 S.E.2d at 357.* But see *Bivins, 19 Va. App. at 753, 454 S.E.2d at 743* ("where the victim's fear results from the taking itself, the taking is not accomplished through intimidation").

To establish that the victim was in fear or was intimidated, or to prove an allegation in the indictment that the defendant perpetrated the robbery with a firearm, it is irrelevant whether the object was an actual, functioning firearm. "The victim of a holdup is not required to know whether the gun pointed at him is loaded or whether it shoots bullets or blanks. If he is sensible he acts on appearances." *Johnson v. Commonwealth, 209 Va. 291, 296, 163 S.E.2d 570, 574 (1968).*

In *Fagan*, the defendant and two confederates impersonated undercover police officers and used a flashing blue light to cause the victims' car to pull over. The defendant tapped on the window of the victims' car with the handle of a sheathed knife. The purported officers directed the car's occupants to get out of the car and put their hands on the vehicle, and then frisked them. During the frisk, the pretend officers took wallets and cell phones from the victims. The Court of Appeals rejected the defendant's claim that the theft from one of the victims was accomplished by trick, rather than intimidation. Although the victim did not know the assailants were not real officers until they drove away, he testified that he was "nervous and scared" during the searches. The Court of Appeals concluded that under all the facts of the case, a rational fact finder could conclude the defendant took the property by intimidation. *Fagan, 63 Va. App. at 400, 758 S.E.2d at 80–81.*

Completed Robbery Precludes Instruction on Attempted Robbery. Once the robbery is complete, the defendant is not entitled to an instruction on attempted robbery. See *Brown v. Commonwealth, 24 Va. App. 292, 295–96, 482 S.E.2d 75, 77 (1997)* (defendant not entitled to an attempted robbery instruction where he took a wallet by force, found the wallet contained no money, and abandoned the wallet immediately).

Deadly Weapon. Va. Code Ann. § 18.2-58 specifically lists the use of a deadly weapon as one method for accomplishing a robbery. Although the term "deadly weapon" has not been defined in the context of § 18.2-58, a number of cases have explained the meaning of this term in the context of Va. Code Ann. § 18.2-93, which addresses entering a bank while armed with a deadly weapon. See, e.g., *Cox v. Commonwealth, 218 Va. 689, 691–92, 240 S.E.2d 524, 525–26 (1978).* The robbery statute differentiates between a robbery committed with a firearm and a robbery committed with a deadly weapon that is not a firearm. Va. Code Ann. § 18.2-58. Therefore, Instruction No. 47.170 defines deadly weapon for purposes of this section. The definition specifically excludes a firearm.

Enhanced Punishment. In order for robbery convictions from another state to subject a defendant to the mandatory penalty provided in Va. Code Ann. § 19.2-297.1, the other state's crimes must be substantially similar to Virginia's. See *Dean, 61 Va. App. at 213–14, 734 S.E.2d at 675–76* (Maryland robbery not substantially similar to Virginia's).

Serious Bodily Injury. Where it is alleged that the robbery caused a serious bodily injury, Instruction No. 47.150, defining that term, should be given in conjunction with the robbery instruction.

Robbery Committed by Using or Displaying a Firearm. If the Commonwealth alleges that the robbery was committed by using or displaying a firearm, use Instruction No. 47.160, which defines that term. The robbery statute incorporates by reference the definition of a firearm found in Virginia Code Ann. § 18.2-308.2:2.

Robbery and Other Crimes:

Abduction. A defendant can also lawfully be convicted of both abduction and robbery. The threshold question is whether the abduction was "separate and apart from, and not merely incidental to, the restraint employed in the commission of the [robbery]." *Brown v. Commonwealth, 230 Va. 310, 314, 337 S.E.2d 711, 713–14 (1985).* In determining whether the abduction was incidental to the robbery, courts consider (1) the duration of the detention (and the distance of) the asportation, (2) whether the detention or asportation occurred during the robbery, (3) whether the detention or asportation was inherent in the robbery, and (4) whether the detention or asportation created danger to the victim independent from the danger posed from the robbery. Courts have also looked to whether the detention or asportation was intended to help avoid the detection of the robbery. *Wiggins v. Commonwealth, 47 Va. App. 173, 184–88, 622 S.E.2d 774, 779–81 (2005)*; *Hoyt v. Commonwealth, 44 Va. App. 489, 494–97, 605 S.E.2d 755, 757–59 (2004).*

Assault and Battery. Assault and battery is not a lesser-included offense of robbery. *Adeniran v. Commonwealth, 63 Va. App. 617, 624–26, 761 S.E.2d 782, 785–86 (2014).* In addition, it cannot be presumed, simply because the defendant was involved in an attack on the victim, that the defendant acted as a principal in the second degree to any robbery that occurred during the attack. *Abdullah v. Commonwealth, 53 Va. App. 750, 755–57, 675 S.E.2d 215, 218–19 (2009).*

Larceny. While robbery involves actual or threatened violence, larceny does not necessarily involve violent conduct. *Anderson v. Commonwealth, 69 Va. App. 396, 404, 819 S.E.2d 857, 861 (2018).* The timing of the violence can determine whether the crime is larceny or robbery. In general, the violence or fear of violence which is essential to the crime must occur before the property is taken, or at the same time that it is taken. See generally *Mills, 52 Va. App. at 217, 662 S.E.2d at 638*; *Broady, 16 Va. App. at 290–91, 429 S.E.2d at 474*; *Jones, 26 Va. App. at 739–40, 496 S.E.2d 670*; *Mason, 200 Va. at 255–57, 105 S.E.2d at 151–52.* While the violence or intimidation must precede or be concomitant with the taking, violence used to complete possession supports robbery. *Beard, 19 Va. App. at 365, 451 S.E.2d at 701–02.* Likewise, violence used to convert mere custody to possession also supports robbery. *Jones, 267 Va. at 288–90, 591 S.E.2d at 70–72.*

The crimes of robbery and grand larceny from the person are treated as separate and distinct crimes for purposes of double jeopardy. *Ali v. Commonwealth, 280 Va. 665, 669, 701 S.E.2d 64, 67 (2010).* In addition, the "statutory double jeopardy" provisions of Va. Code Ann. § 19.2-294 do not preclude convictions of two crimes for a single act prosecuted simultaneously. *Id.* However, if no asportation of property occurs before the use of force, the defendant cannot be convicted of larceny. Instead, the crime is robbery only. *Id. at 670, 701 S.E.2d at 67.*

"[A] custodian, holding the property of another upon condition of prompt payment in cash, has committed no larceny until he carries the goods away in violation of the condition, with requisite intent. If, before carrying the goods away, he uses violence or intimidation to avoid payment, that violence or intimidation precedes the taking. Custody is converted into possession by the exercise of force, and the offense is robbery." *Pritchard v. Commonwealth, 225 Va. 559, 562–63, 303 S.E.2d 911, 913 (1983)*; see also *Jones, 267 Va. at 289, 591 S.E.2d at 71* (shoplifter who concealed merchandise and exited the store without the use of any force or intimidation deemed to still be in the process of taking the merchandise when confronted in the parking lot by the store manager, and to have therefore transformed the larceny of the merchandise to a robbery when he produced a firearm to overcome the manager's opposition to the taking).

Enticing persons into a dwelling house to commit certain crimes. Va. Code § 18.2-50.3 provides that a person who commits certain specified crimes, including first and second degree murder, murder of a pregnant woman, abduction with intent to extort money or for immoral purposes, aggravated malicious wounding, robbery, rape, forcible sodomy, or object sexual penetration, within a dwelling house and who, with the intent to commit such crime, enticed, solicited, requested, or otherwise caused the victim to enter the dwelling house is guilty of a separate and distinct Class 6 felony.

Use of a Firearm. For the definition of a "firearm" see Instruction Nos. 18.702 and 18.705.

The use or attempted use of a firearm or displaying a firearm in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary,

malicious wounding or abduction is a separate felony, and a mandatory prison term is imposed for each conviction. Va. Code Ann. § 18.2-53.1. The second or subsequent use of a firearm triggers enhanced penalties under Va. Code Ann. § 18.2-53.1.

In *Ansell v. Commonwealth, 219 Va. 759, 250 S.E.2d 760 (1979)*, in a single proceeding, the defendant was convicted on two counts of robbery and one count of attempted robbery. He was also convicted on three counts of using or displaying a firearm in the commission of a felony. The latter offenses were committed in the course of the defendant's commission of robbery and attempted robbery. The defendant was sentenced to one year under the first count of using or displaying a firearm and three years on the second and third counts pursuant to the heightened penalties for use of a firearm, second or subsequent offense. The defendant argued that the court erred in applying the enhanced punishment provision of Va. Code Ann. § 18.2-53.1 to him because he had not, prior to this proceeding, been convicted of use of a firearm in the commission of a felony. The court, however, affirmed his conviction, holding that the enhanced sentences for use of a firearm, second or subsequent offense under Va. Code Ann. § 18.2-53.1 were properly applied to the three separate offenses for which the defendant was tried. The Court reasoned that "[t]o give the statute the construction sought by Ansell would enable an offender who used a firearm in the commission of a series of serious felonies over an extended period of time prior to his apprehension to enjoy the status of a first offender as to each violation of § 18.2-53.1. We believe that this result would negate the legislative intent and would require an unreasonably restrictive interpretation of the statute." *Id. at 763, 250 S.E.2d at 763.*

A jury's inconsistent verdicts, acquitting the defendant of the underlying robbery but convicting him for use of a firearm, were upheld on appeal under precedent accepting inconsistent verdicts from a jury. *McQuinn v. Commonwealth,* 298 Va. 456, 459–60, *839 S.E.2d 907, 910 (2020)*; *Reed v. Commonwealth, 239 Va. 594, 596–98, 391 S.E.2d 75, 76–77 (1990).*

It is not necessary that the firearm be used in the manner for which it was designed. *Rose v. Commonwealth, 53 Va. App. 505, 509–13, 673 S.E.2d 489, 491–92 (2009)* (gun used as a club). Nor is it necessary that a weapon actually be seen. See *id. at 513–16, 673 S.E.2d at 492–94.*

Instruction No. 47.150

Definition of "Serious Bodily Injury"

"Serious bodily injury" means bodily injury that involves a substantial risk of death, extreme physical pain, obvious disfigurement that lasts for a long time, or loss or impairment of the function of a bodily member, organ, or mental faculty that lasts for a long time.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-58.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The robbery statute incorporates by reference the definition of "serious bodily injury" found in Va. Code Ann. § 18.2-51.4. See Va. Code Ann. § 18.2-58. The instruction incorporates that definition verbatim, except for one change. That change, made for ease of comprehension, is the replacement of the term "protracted," which is found in the statute, with the words "that lasts for a long time."

Instruction No. 47.160

Definition of a "firearm"

A firearm is any handgun, shotgun, or rifle that either will, or is designed to, or may readily be converted to, expel single or multiple projectiles by action of an explosion of a combustible material.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-58.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The robbery statute incorporates by reference the definition of "firearm" found in Va. Code Ann. § 18.2-308.2:2. See Va. Code Ann. § 18.2-58. The instruction incorporates that definition verbatim except for the addition of commas. Because there are several definitions of a "firearm" in the Code of Virginia, this instruction should be used, as appropriate, when the charge is robbery.

Instruction No. 47.170

Definition of a "Deadly Weapon"

A deadly weapon is any object or instrument other than a firearm, not part of the human body, that is likely to cause death or great bodily injury because of the manner and under the circumstances in which it is used.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-58.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The robbery statutes distinguish between robberies committed with a firearm and robberies committed with a deadly weapon. A "deadly weapon" for purposes of the robbery statute does not include a firearm. This instruction is taken from Instruction No. 18.850, but includes the added language clarifying that a deadly weapon in this context does not include a firearm.

Instruction No. 47.200

Carjacking

The defendant is charged with the crime of carjacking. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [seized; seized control of] **a motor vehicle of another; and**

(2) **That the defendant acted with intent to** [permanently; temporarily] **deprive another in possession or control of that vehicle of that possession or control by means of** [partial strangulation; suffocation; striking, beating or other violence to the person; assault or otherwise putting a person in fear of serious bodily harm; the threat or presenting of a firearm; the threat or presenting of a deadly weapon].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Concluding

Instruction No. P47.200

Carjacking

You have found the defendant guilty of the crime of carjacking.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Imprisonment for life; or

(2) A specific term of imprisonment, but not less than fifteen (15) years.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-58.1.

Principal Case Authority:

Hilton v. Commonwealth, 293 Va. 293, 298–303, 797 S.E.2d 781, 784–86 (2017); *Bell v. Commonwealth, 21 Va. App. 693, 697–99, 467 S.E.2d 289, 291–92 (1996).*

Other Relevant Decisions:

Fletcher v. Commonwealth, 72 Va. App. 493, 502–06, 849 S.E.2d 594, 598–600 (2020); *Pressley v. Commonwealth, 54 Va. App. 380, 384–87, 679 S.E.2d 551, 554–55 (2009)*; *Spencer v. Commonwealth, 42 Va. App. 443, 448–49, 592 S.E.2d 400, 402–03 (2004); Brown v. Commonwealth, 37 Va. App. 507, 517–18, 559 S.E.2d 415, 420–21 (2002); Sanchez v. Commonwealth, 32 Va. App 238, 241, 527 S.E.2d 461, 463 (2000); Vinson v. Commonwealth, 258 Va. 459, 470, 522 S.E.2d 170, 177 (1999); Keyser v. Commonwealth, 22 Va. App. 747, 749–50, 473 S.E.2d 93, 94–95 (1996).*

Practice Commentary: The carjacking statute was held to be constitutional in *Bell*, with the Court of Appeals explaining as follows:

> The carjacking statute, well-grounded in the law of robbery, defines and limits the [offense] in a manner that does not encourage arbitrary and discriminatory enforcement. Viewed as a particularized form of robbery, the carjacking statute contains both temporal and [spatial] limits which negate [the] argument [that it is unconstitutional based on a vagueness theory].
>
> We do not construe the carjacking statute to cover every case where a defendant takes a victim's car keys and then deprives the victim of his or her vehicle. Rather, the Commonwealth must prove an act of violence against the victim that precedes or is concomitant with the taking of the vehicle from the possession or control of the victim. . . .

21 Va. App. at 701–02, 467 S.E.2d at 293.

"[U]nder the explicit terms of Code § 18.2-58.1, a perpetrator can commit carjacking without actually seizing the victim's vehicle, i.e., taking possession of it." *Hilton, 293 Va. at 299, 797 S.E.2d at 784.* "Short of seizure, a perpetrator can violate the statute by only seizing *control* of the victim's vehicle, i.e., 'exercis[ing] power' over it, . . . meaning the victim can be deprived of possession or control of his vehicle without the perpetrator actually entering the vehicle." *Id.* (finding sufficient evidence that defendant seized control of the victim's truck when he took the victim's keys at gunpoint while standing near the truck because the victim was not at that moment free to get back in the truck). *See also Bell, 21 Va. App. at 697–99, 467 S.E.2d at 291–92* (finding sufficient evidence that defendant seized control of victim's vehicle when he took the keys from the victim after having grabbed her purse strap from behind and having demanded, in a threatening and

aggressive manner, that she surrender the keys to him). Accordingly, "the Commonwealth may prove a violation of the carjacking statute in one of two ways: either by establishing that the defendant 'seiz[ed]' the vehicle or by proving that the defendant 'seiz[ed] . . . control' of the vehicle." *Fletcher, 72 Va. App. at 502, 849 S.E.2d at 598.* "In sum, a carjacker 'seizes' a vehicle . . . upon 'taking possession' of the vehicle, which often occurs when the carjacker enters the victim's vehicle and drives away. In contrast, a carjacker 'seizes control' of a vehicle . . . when the carjacker merely 'exercise[s] power' or restraint over the victim's vehicle, such as by taking the victim's keys." *Id. at 504, 599.*

This model jury instruction "tracks the elements of carjacking under Code § 18.2-58.1 nearly verbatim . . . [and thereby] 'fully and fairly cover[s]' the elements of this offense." *Hilton, 293 Va. at 302–03, 797 S.E.2d at 786,* (affirming trial court's refusal of additional instructions on the issue whether defendant's act of taking the truck keys from the victim by force factored into whether the defendant exerted control).

For an instruction defining firearm, see Instruction No. 18.705. For an instruction defining deadly weapon, see Instruction No. 18.850.

Intimidation may constitute the element of putting a person in fear of serious bodily harm. *Pressley, 54 Va. App. at 385–86, 679 S.E.2d at 554*; see also *Bell, 21 Va. App. at 701, 467 S.E.2d at 293.*

Items of personal property taken by force during the carjacking, such as a purse, will support a separate conviction for robbery when they involve separate and distinct acts apart from the seizure of the vehicle. *Brown, 37 Va. App. at 517–18, 559 S.E.2d at 420.*

Where the evidence disclosed "that by wrongful acts, [the defendant] by physical force 'pounced over [the victim's] upper body' and restrained her movement by 'grabbing [the victim's] arms' while unsuccessfully attempting to 'push [the victim] over into the passenger seat" of her vehicle, but established that the defendant "never seized the vehicle or seized control of the vehicle," the Court of Appeals held that "[t]he evidence would support a conviction for attempted carjacking but not actual carjacking" under Va. Code Ann. § 18.2-58.1. *Keyser, 22 Va. App. at 750, 473 S.E.2d at 94–95.*

ALERTS:

• Assault and battery is not a lesser-included offense of carjacking. *Sanchez, 32 Va. App. at 241–42, 527 S.E.2d at 463.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Carjacking"

John L. Costello & Crag S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 6.5

MICHIE'S JURISPRUDENCE, Automobiles § 126

Commonwealth may prove a violation of the carjacking statute in one of two ways: either by establishing that the defendant "seized" the vehicle or by proving that the defendant "seized" . . . control of the vehicle." *Warner*, 22 Va. App. at 502, [illegible]

[illegible]

vehicle . . . when the carjacker merely "exercise[s] power" or restraint over the victim's vehicle, such as by taking the victim's keys." *Id.* at 504, 599.

This model jury instruction "tracks the elements of carjacking under Code [illegible] . . . [illegible] elements of this offense." *Hilton*, 293 Va. at 502–03, 797 S.E.2d at 780. [illegible] defendant exerted control.

For an instruction defining firearm, see Instruction No. 18.705; for an instruction defining deadly weapon, see Instruction No. 18.850.

Intimidation may constitute the element of putting a person in fear of serious [illegible]

[illegible]

Where the evidence disclosed "that by wrongful acts, [the defendant] by [illegible]

[illegible]

of Appeals held that "[the evidence would support a conviction for attempted carjacking but not actual carjacking" under Va. Code Ann. § 18.2 58.1. *Warner*, 22 Va. App. at 750, 473 S.E.2d at 94–95.

[illegible]

[illegible]

Va. App. at 241–43, 527 S.E.2d at 463.

[illegible] REFERENCES:

[illegible] Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Carjacking."

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § [illegible]

MICHIE'S JURISPRUDENCE, Automobile, § 1[illegible]

[illegible]

CHAPTER 48

SEXUAL OFFENSES

Scope Note

Instruction No. 48.420 Sodomy—By Force

Instruction No. P48.420 Sodomy—By Force

Instruction No. 48.440 Sodomy—By Force—Child Under Thirteen (13)

Instruction No. P48.440 Sodomy—By Force—Child Under Thirteen (13)

Instruction No. 48.460 Sodomy—Penetration

Instruction No. 48.465 Sodomy by Cunnilingus—Penetration

Instruction No. 48.500 Object Sexual Penetration

Instruction No. P48.500 Object Sexual Penetration

Instruction No. 48.600 Sexual Battery—Aggravated (Force, Threat, or Intimidation)

Instruction No. P48.600 Sexual Battery—Aggravated (Force, Threat, or Intimidation)

Instruction No. 48.600(a) Sexual Battery—Aggravated (Mental Incapacity/ Physical Helplessness)

Instruction No. P48.600(a) Sexual Battery—Aggravated (Mental Incapacity/ Physical Helplessness)

Instruction No. 48.600(b) Sexual Battery—Aggravated (Child under 13 Years Old)

Instruction No. P48.600(b) Sexual Battery—Aggravated (Child under 13 Years Old)

Instruction No. 48.600(c) Sexual Battery—Aggravated (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative)

Instruction No. P48.600(c) Sexual Battery—Aggravated (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative)

Instruction No. 48.600(d) Sexual Battery—Aggravated (Massage Therapist, Practitioner of Healing Arts, or Physical Therapist)

Instruction No. P48.600(d) Sexual Battery—Aggravated (Massage Therapist, Practitioner of Healing Arts or Physical Therapist)

Instruction No. 48.605 Massage Therapist—Defined

Instruction No. 48.610 Massage Therapy—Defined

Instruction No. 48.615 Person Practicing the Healing Arts or Purporting to Practice the Healing Arts

Instruction No. 48.620 Healing Arts—Defined

Instruction No. 48.625 Physical Therapist—Defined

Instruction No. 48.630 Practice of Physical Therapy—Defined

Instruction No. 48.640 Sexual Battery

Instruction No. P48.640 Sexual Battery

Instruction No. 48.650 Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender

Instruction No. P48.650 Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender

Instruction No. 48.660 Sexual Abuse—Definition

Instruction No. 48.660 Intimate Parts—Definition

Instruction No. 48.670 Threat of Force—Definition

Instruction No. 48.675 Intimidation—Definition

Instruction No. 48.680 Consent

Instruction No. 48.700 Prostitution—General

Instruction No. P48.700 Prostitution—General

Instruction No. 48.720 Prostitution—Attempt

Instruction No. P48.720 Prostitution—Attempt

Instruction No. 48.800 Bawdy Place—Keeping or Visiting

Instruction No. P48.800 Bawdy Place—Keeping or Visiting

Instruction No. 48.850 Bawdy Place—Definition

Instruction No. 48.860 Keeping—Definition

SCOPE NOTE

These instructions cover some of Virginia's principal sexual offenses. Instructions relating to the criminal sexual assaults of rape and carnal knowledge of certain minors and others are contained in Chapter 44 of this Volume. Some sexual offenses involving children are dealt with in Chapter 29 of this Volume, entitled, "Family Offenses and Crimes Against Children."

Instruction Nos. 48.420, 48.430, and 48.440, based on Va. Code Ann. § 18.2-67.1, define the offense of sodomy by force. Instruction No. 48.460 is a general instruction on penetration, and Instruction No. 48.465 applies to penetration in sodomy by cunnilingus.

Criminal sexual assault includes object sexual penetration (Va. Code Ann. § 18.2-67.2) and five types of aggravated sexual battery (Va. Code Ann. § 18.2-67.3), for which Instruction Nos. 48.500 and 48.600 to 48.600(d), respectively, should be used. Instruction Nos. 48.610 to 48.630 are definitional instructions to accompany Instruction 48.600(d). Instruction Nos. 48.640 and 48.650, respectively deal with the misdemeanors of sexual battery, and sexual battery of an inmate, parolee, probationer, pretrial defendant, or posttrial offender (Va. Code Ann. § 18.2-67.4). Instruction No. 48.660, based on Va. Code Ann. § 18.2-67.10, defines "sexual abuse" and Instruction No. 48.670 also based on Va. Code Ann. § 18.2-67.10, defines "intimate parts." Other definitions contained in Va. Code Ann. § 18.2-67.10 are found in Instruction Nos. 44.320 ("mental incapacity") and 44.340 ("physical helplessness"). No instructions were prepared for the definitions of "complaining witness" or "prior sexual conduct."

Where a defendant charged with criminal sexual assault punishable as a felony under Article 7 of Chapter 4 of Title 18.2 has at least twice previously been convicted of a felony, see Va. Code Ann. § 19.2-297.1 for possible enhancement of sentence.

Va. Code Ann. § 18.2-67.5 provides that an attempt to commit forcible sodomy or object sexual penetration is a Class 4 felony, an attempt to commit aggravated sexual battery is a Class 6 felony, and an attempt to commit sexual battery is a Class 1 misdemeanor. No instructions have been prepared for these attempts, but attempted rape (a Class 4 felony) is Instruction No. 44.400.

The third conviction of some of the misdemeanor offenses prohibited by Va. Code Ann. § 18.2-67.4, Va. Code Ann. § 18.2-67.5, Va. Code Ann. § 18.2-371, or Va Code Ann § 18.2-130 is a felony. See Va. Code Ann. § 18.2-67.5:1.

Va. Code Ann. § 18.2-67.6 provides that proof of physical resistance is not required in order to obtain a conviction for commission of or attempt to commit forcible sodomy, animate or inanimate object sexual penetration, aggravated sexual battery, and sexual battery. Instruction No. 44.620 is based on this governing statute and may also be used for the above-mentioned sexual assault crimes.

Instruction No. 48.680 defines threat of force, and Instruction No. 48.685 defines intimidation. Instruction No. 48.690 concerns consent. These three instructions are based on case authority.

Va. Code Ann. § 18.2-67.7 places limitations on the admissibility of evidence of the complaining witness's prior sexual conduct. The governing statute should be consulted for specific requirements and exceptions. But see *Winfield v. Commonwealth*, 225 Va. 211, 218–20, 301 S.E.2d 15, 19–21 (1983) (refusing to allow evidence or opinion on the general unchaste character of the complaining witness but allowing evidence tending to show that the individual had a distinct pattern of past sexual conduct and directly related extortion). Va. Code Ann. § 18.2-67.8 sets requirements for closed preliminary hearings.

In addition, Va. Code Ann. § 18.2-67 allows for the deposition of the complaining witness involving the commission of or the attempt to commit forcible sodomy, animate or inanimate object sexual penetration, aggravated sexual battery, and sexual battery. Instruction No. 44.900 specifies the force and effect of such deposition and may also be used for the above-mentioned sexual assault crimes.

Instruction Nos. 48.700 and 48.720 cover the offense of prostitution, and they are based on Va. Code Ann. §§ 18.2-346, 18.2-346.01. Instruction No. 48.700 covers the general offense of prostitution, while Instruction No. 48.720 deals with attempted prostitution.

Instruction Nos. 48.800–48.860 deal with keeping or visiting a bawdy place. Instruction No. 48.800, based on Va. Code Ann. § 18.2-347, covers the basic elements of the offense. Instruction No. 48.850, based partially on Va. Code Ann. § 18.2-347, provides a definition of a bawdy place. Instruction No. 48.860 defines "keeping."

There are many other statutory provisions for which no instructions have been provided, such as aiding prostitution or illicit sexual intercourse (Va. Code Ann. § 18.2-348); using a vehicle to promote prostitution or illicit sexual intercourse (Va. Code Ann. § 18.2-349); taking or detaining a person for prostitution, or consenting thereto when one is the legal guardian of such person (Va. Code Ann. § 18.2-355); receiving money for procuring a person for unlawful sexual intercourse (Va. Code Ann. § 18.2-356); receiving money from the earnings of a male or female prostitute (Va. Code Ann. § 18.2-357); commercial sex trafficking (Va. Code Ann. § 18.2-357.1); adultery or fornication by those forbidden to marry, commonly known as incest (Va. Code Ann. § 18.2-366); placing or leaving one's wife in a bawdy place for prostitution (Va. Code Ann. § 18.2-368); attempting to unlawfully photograph a non-consenting female's intimate parts not visible to the general public (Va. Code Ann. § 18.2-386.1).

Proper instructions can be prepared by using the statutory language that is relevant to the particular case authority.

Instruction No. 48.420

Sodomy—By Force

The defendant is charged with the crime of sodomy by force. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the [penis; mouth; tongue] **of the defendant penetrated into the** [mouth; anus; female sex organ] **of** (name of person)**; and**

(2) That it was against [his; her] **will; and**

(3) That it was by force, threat, or intimidation.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.420

Sodomy—By Force

You have found the defendant guilty of the crime of sodomy by force.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a term of imprisonment for life or for a specific term, but not less than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.1.

CASE AUTHORITY:

Alvarez Saucedo v. Commonwealth, 71 Va. App. 31, 47-49, 833 S.E.2d 900, 907–08 (2019); *Bowden v. Commonwealth, 52 Va. App. 673, 678, 667 S.E.2d 27, 29 (2008)*; *Molina v. Commonwealth, 272 Va. 666, 674–76, 636 S.E.2d 470, 475–76 (2006); Mitchell v. Commonwealth, 41 Va. App. 598, 599, 587 S.E.2d 727, 727 (2003); Cairns v. Commonwealth, 40 Va. App. 271, 294–96, 579 S.E.2d 340, 351–52 (2003); Mohajer v. Commonwealth, 39 Va. App. 21, 29–32, 569 S.E.2d 738, 742–43 (2002), aff'd on reh'g en banc, 40 Va. App. 312, 579 S.E.2d 359 (2003); Burns v. Commonwealth, 261 Va. 307, 337–38, 541 S.E.2d 872, 891–92 (2001).*

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-67.1 also applies to causing the complaining witness to engage in a prohibited act with any person and accomplishing a prohibited act through the use of the complaining witness's mental incapacity or physical helplessness. See *Mitchell, 41 Va. App. at 599, 587 S.E.2d at 727* (forcible sodomy involving mentally retarded victim). "Mental incapacity" is defined in Instruction No. 44.320, and "physical helplessness" is defined in Instruction No. 44.340.

As to proof of resistance, see Instruction No. 44.620.

For a discussion regarding the separate and distinct elements of abduction incident to rape and sodomy, see *Vay v. Commonwealth, 67 Va. App. 236, 252, 795 S.E.2d 495, 502 (2017).*

Although the jury must be unanimous in finding that that the prosecution proved the elements of the crime, the jury need not agree on the means by which he committed the crime, i.e. whether the act was accomplished through physical helplessness or mental incapacity. *Davison v. Commonwealth, 298 Va. 177, 178-79, 836 S.E.2d 390, 391 (2019).*

☞ ***PRACTICE POINTER:***

If the victim is under age thirteen, see Instruction No. 48.440.

ALERTS:

• Conviction of both forcible sodomy (Va. Code Ann. § 18.2-67.1(A)) and carnal knowledge (Va. Code Ann. § 18.2-361) may be double jeopardy. *Chaine v. Commonwealth, 17 Va. App. 179, 185, 436 S.E.2d 187, 191 (1993), aff'd on reh'g en banc, 18 Va. App. 301, 443 S.E.2d 924 (1994).*

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 678, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.440

Sodomy—By Force—Child Under Thirteen (13)

The defendant is charged with the crime of sodomy by force. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant engaged in** [cunnilingus; fellatio; anilingus; anal intercourse] **with** [name of child]**; or caused** [name of child] **to engage in such acts with any other person, and**

(2) [Name of child] **was less than thirteen (13) years of age at the time of such act(s).**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.440

Sodomy—By Force—Child Under Thirteen (13)

You have found the defendant guilty of the crime of sodomy by force.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a term of imprisonment for life or for a specific term, but not less than five (5) years.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.1(A)(1)–(2).

CASE AUTHORITY:

Nelson v. Commonwealth, 41 Va. App. 716, 739–40, 589 S.E.2d 23, 34–35 (2003), aff'd, 268 Va. 665, 604 S.E.2d 76 (2004); Lockhart v. Commonwealth, 34 Va. App. 329, 340–47, 542 S.E.2d 1, 6–9 (2001); Martin v. Commonwealth, 4 Va. App. 438, 443–44, 358 S.E.2d 415, 418–19 (1987).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-67.1 also covers causing the complaining witness to engage in a prohibited act with any person, and the statute lists other prohibited acts.

Va. Code Ann. § 18.2-67.1(A)(1) creates a separate unit of prosecution for each prohibited act. Thus, a defendant can be convicted of multiple counts, even when the acts occurred on the same day with the same victim. *Nelson, 41 Va. App. at 739–40, 589 S.E.2d at 34–35.*

PRACTICE POINTER:

As to victims not under age thirteen, see Instruction No. 48.420

ALERTS:

In such instances, the guilt and punishment instructions should be modified accordingly.

• Va. Code Ann. § 18.2-67.1 also provides that in all cases where the victim is a child under age 13 and the offender is more than three years older than the victim, if the term of confinement imposed is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. Such a suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court. However, if it is also alleged in the indictment that the offender was 18 years of age or older at the time of the offense, the punishment is a mandatory minimum term of life imprisonment.

• Conviction of forcible sodomy (Va. Code Ann. § 18.2-67.1(A)) and carnal knowledge (Va. Code Ann. § 18.2-361) is double jeopardy. *Chaine v. Commonwealth, 17 Va. App. 179, 185, 436 S.E.2d 187, 191 (1993), aff'd on reh'g en banc, 18 Va. App. 301, 443 S.E.2d 924 (1994).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.460

Sodomy—Penetration

To be sodomy by [fellatio; anal intercourse]**, there must be penetration, no matter how slight, of the penis into the** [mouth; anus] **of another. Mere touching of the penis to the** [mouth; anus] **is not sufficient. It is not necessary that there be an ejaculation.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Will v. Commonwealth, 31 Va. App. 571, 582–83, 525 S.E.2d 37, 42–43 (2000); Jett v. Commonwealth, 29 Va. App. 190, 194, 510 S.E.2d 747, 749 (1999); Lawson v. Commonwealth, 13 Va. App. 109, 113, 409 S.E.2d 466, 468 (1991); Morrison v. Commonwealth, 10 Va. App. 300, 301, 391 S.E.2d 612, 612 (1990); Chrisman v. Commonwealth, 3 Va. App. 371, 377–78, 349 S.E.2d 899, 903 (1986); Ryan v. Commonwealth, 219 Va. 439, 444–45, 247 S.E.2d 698, 702 (1978); Ashby v. Commonwealth, 208 Va. 443, 444, 158 S.E.2d 657, 658 (1968); Hudson v. Commonwealth, 141 Va. 525, 527, 127 S.E. 89, 89 (1925).

PRACTICE COMMENTARY: Evidence of penetration is required for forcible sodomy, *Hudson, 141 Va. at 527, 127 S.E. at 89*, but the penetration "need only be slight." *Jett, 29 Va. App. at 194, 510 S.E.2d at 749.*

In *Ashby, 208 Va. at 444, 158 S.E.2d at 658*, the court reversed the defendant's conviction for sodomy because the Commonwealth failed to prove penetration.

In *Ryan*, the Supreme Court of Virginia again said that penetration in a sodomy case can be proved by circumstantial evidence. In particular, the *Ryan* court noted that the victim's account of the defendant's assault, which lasted for at least forty-five minutes, was enough for the jury to infer that penetration had occurred. *219 Va. at 444–45, 247 S.E.2d at 702.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.465

Sodomy by Cunnilingus—Penetration

To be sodomy by cunnilingus, there must be penetration, no matter how slight, into the outer lips of the female sexual organ by the [mouth; tongue] **of another. Mere touching is not sufficient.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Will v. Commonwealth, 31 Va. App. 571, 582–83, 525 S.E.2d 37, 43 (2000); Jett v. Commonwealth, 29 Va. App. 190, 194, 510 S.E.2d 747, 749 (1999) (en banc); *Horton v. Commonwealth, 255 Va. 606, 613, 499 S.E.2d 258, 261 (1998); Moore v. Commonwealth, 254 Va. 184, 186–91, 491 S.E.2d 739, 740–43 (1997); Love v. Commonwealth, 18 Va. App. 84, 87–90, 441 S.E.2d 709, 711–13 (1994); Ryan v. Commonwealth, 219 Va. 439, 444–45, 247 S.E.2d 698, 702 (1978).*

PRACTICE COMMENTARY: In *Ryan*, the Supreme Court of Virginia said that penetration in a sodomy case can be proved by circumstantial evidence. In particular, the *Ryan* court noted that the victim's account of the defendant's assault, which lasted for at least forty-five minutes, was enough for the jury to infer that penetration had occurred. Moreover, evidence of the position and proximity of the parties may be sufficient to support a finding of sodomy by cunnilingus. *219 Va. at 444–45, 247 S.E.2d at 702.*

For a detailed discussion of what is required to show penetration in this context, see *Horton, 255 Va. at 613, 499 S.E.2d at 261.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.500

Object Sexual Penetration

The defendant is charged with the crime of object sexual penetration. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant penetrated the** [anus; outer lips of the female sexual organ] **of** (name of person) **with any** [animate/inanimate] **object; and**

(2) **That it was against** [his; her] **will; and**

(3) **That it was by force, threat, or intimidation of or against** (name of person; name of other person)**.**

[(4) That it was not for a bona fide medical purpose.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Notes:

If the defense is that it was for a bona fide medical purpose, then add the bracketed fourth element.

When the complaining witness is less than thirteen (13) years of age, the Commonwealth does not have to prove that the sexual penetration was against his or her will or by force, threat, or intimidation. In such case authority, Elements (2) and (3) should be replaced by the following:

(2) That at the time of the act (name of child) **was under the age of thirteen (13).**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one of the elements of the crime, then you must find the defendant not guilty.

Notes:

If the defense is that it was for a bona fide medical purpose, then add the bracketed fourth element.

Commonwealth does not have to prove that the sexual penetration was against his or her will or by force, threat, or intimidation. In such case *authority*, Element (2)

Instruction No. P48.500

Object Sexual Penetration

You have found the defendant guilty of the crime of object sexual penetration.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at confinement in the penitentiary for life or for a specific term, but not less than five (5) years.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-67.2.

Case Authority:

Bondi v. Commonwealth, 70 Va. App. 79, 89, 824 S.E.2d 512, 516 (2019); Davis v. Commonwealth, 272 Va. 476, 478–80, 634 S.E.2d 322, 323–24 (2006); Martin v. Commonwealth, 272 Va. 31, 35, 630 S.E.2d 291, 292 (2006); Mohajer v. Commonwealth, 39 Va. App. 21, 29–32, 569 S.E.2d 738, 742–43 (2002), aff'd on reh'g en banc, 40 Va. App. 312, 579 S.E.2d 359 (2003); Commonwealth v. Bower, 264 Va. 41, 44–47, 563 S.E.2d 736, 737–39 (2002); Wactor v. Commonwealth, 38 Va. App. 375, 383, 564 S.E.2d 160, 164 (2002); Will v. Commonwealth, 31 Va. App. 571, 582–83, 525 S.E.2d 37, 42–43 (2000); Clark v. Commonwealth, 30 Va. App. 406, 411–12, 517 S.E.2d 260, 262 (1999); Jett v. Commonwealth, 29 Va. App. 190, 194, 510 S.E.2d 747,749 (1999); Marshall v. Commonwealth, 26 Va. App. 627,634–35, 496 S.E.2d 120, 123–24 (1998).

Practice Commentary: The governing statute also covers causing the complaining witness to engage in a prohibited act with any person and accomplishing a prohibited act through the use of the complaining witness's mental incapacity or physical helplessness. "Mental incapacity" is defined in Instruction No. 44.320, and "physical helplessness" is defined in Instruction No. 44.340. For a discussion of "physical helplessness" under this statute see *Wactor, 38 Va. App. at 383 n.3, 564 S.E.2d at 164 n.3*. As to proof of resistance, see Instruction No. 44.620.

Force generally requires proof or more than "merely the force required to accomplish . . . the statutorily defined criminal acts." *Sabol v. Commonwealth, 37 Va. App. 9, 16, 553 S.E.2d 533, 536 (2001)*. Circumstances supporting a finding of force include the victim's relationship to the defendant, the aggressive nature of the defendant's behavior, the victim's fear or reaction during or after the crime, and the time and place of the crime. *Bondi, 70 Va. App. at 89, 824 S.E.2d at 516*.

The force employed when the victim is under the age of 13 is "constructive force" because the victim cannot legally consent. Proof of the victim's age establishes the element of constructive force. *Martin, 272 Va. at 35–36, 630 S.E.2d at 292–93*.

Intimidation may occur without threats, and a factfinder may consider "the victim's age, the relative size of the defendant and victim, the familial relationship between the defendant and the victim, and the vulnerable position of the victim in evaluating whether an act was accomplished by intimidation." *Bondi, 70 Va. App. at 90, 824 S.E.2d at 517.*

☞ ***Practice Pointer:***

Va. Code Ann. § 18.2-67.2(A) also deals with the victim being penetrated by an

animal; no instructions have been drafted for this provision.

ALERTS:

• Va. Code Ann. § 18.2-67.2 also provides that in all cases where the victim is a child under age 13 and the offender is more than three years older than the victim, if the term of confinement imposed is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. Such a suspended sentence shall be suspended for the remainder of the defendant's life, subject to revocation by the court. However, if it is also alleged in the indictment that the offender was 18 years of age or older at the time of the offense, the punishment is a mandatory minimum term of life imprisonment.

• Va. Code Ann. § 18.2-67.2(A) includes causing the complaining witness to penetrate his or her own body with any object.

• Skin on skin contact is not required for a conviction under Va. Code Ann. § 18.2-67.2(A). *Davis, 272 Va. at 479–80, 634 S.E.2d at 323–24*(holding the fact that the victim was clothed at the time did not preclude conviction when the defendant put his finger inside the front area of the lips of the victim's vagina).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.600

Sexual Battery—Aggravated (Force, Threat, or Intimidation)

The defendant is charged with the crime of aggravated sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sexually abused (name of person)**; and**

(2) That it was against [his; her] **will; and**

(3) That it was by force, threat, or intimidation; and

[(4) That the defendant [caused serious bodily or mental injury to (name of person).]

or

[(4) That the defendant used or threatened to use a dangerous weapon.]

or

[(4) [That (name of person) was at least 13 but less than 15 years old.]

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.600

Sexual Battery—Aggravated (Force, Threat, or Intimidation)

You have found the defendant guilty of the crime of aggravated sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.3(A)(4).

CASE AUTHORITY:

Robinson v. Commonwealth, 70 Va. App. 509, 514–17, 271–73 (2019); *Cabral v. Commonwealth, 69 Va. App. 67, 72, 815 S.E.2d 805, 808 (2018)*; *Gonzin v. Commonwealth, 59 Va. App. 1, 7–12, 716 S.E.2d 466, 469–71 (2011)*; *Bowden v. Commonwealth, 52 Va. App. 673, 677-78, 667 S.E.2d 27, 29 (2008)*; *De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007)*; *Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507–08 (2005)*; *Clark v. Commonwealth, 30 Va. App. 406, 409–11, 517 S.E.2d 260, 261–62 (1999)*; *McManus v. Commonwealth, 16 Va. App. 310, 311–13, 429 S.E.2d 475, 475–77 (1993)*; *Walker v. Commonwealth, 12 Va. App. 438, 444–45, 404 S.E.2d 394, 397 (1991)*.

PRACTICE COMMENTARY: In *De'Armond, 51 Va. App. at 33, 654 S.E.2d at 320*, the Court of Appeals of Virginia held that Va. Code Ann. § 18.2-67.3(A) "creates a unit of prosecution for each act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Va. Code Ann. § 18.2-67.10(2)."

For a discussion of "serious bodily or mental injury," see *Gonzin, 59 Va. App. at 7–12, 716 S.E.2d at 469–71*. As to proof of resistance, see Instruction No. 44.620.

A "dangerous weapon" is one, such as a Taser, that is able or likely to inflict injury. *Cabral, 69 Va. App. at 73, 815 S.E.2d at 808*.

In *Walker, 12 Va. App. at 444–45, 404 S.E.2d at 397*, the Court of Appeals found an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser included offense of sexual battery, Va. Code Ann. § 18.2-67.4.

The role of teacher supervising a student is not sufficient alone to constitute intimidation. *Clark v. Commonwealth, 12 Va. App. 1163, 1166, 408 S.E.2d 564, 566 (1991)*.

Sexual abuse is defined in Instruction No. 48.660.

Intimate parts are defined in Instruction No. 48.670.

ALERTS:

• The instructions include four separate versions of the elements under the governing statute. Only the elements fitting the facts of the case should be used. See Instructions Nos. 48.600(a) (Mental Incapacity/ Physical Helplessness), 48.600(b) (Child under 13 Years Old), 48.600(c) (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative), 48.600(d) (Massage Therapist/ Purporting to be Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing Arts; Physical Therapist/Purporting to be Physical Therapist). In addition, several definitional instructions are provided

which, depending on the evidence, may be applicable. See Instruction Nos. 48.605 (Massage Therapist—Defined), 48.610 (Physical Therapy—Defined), 48.615 (Person Practicing or Purporting to Practice the Healing Arts), 48.620 (Healing Arts—Defined), 48.625 (Physical Therapy—Defined), and 48.630 (Practice of Physical Therapy—Defined).

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 677–78, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.600(a)

Sexual Battery—Aggravated (Mental Incapacity/ Physical Helplessness)

The defendant is charged with the crime of aggravated sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant sexually abused** (name of person)**; and**

(2) **That the sexual abuse was accomplished through the use of** (name of person)**'s** [mental incapacity; physical helplessness]**; and**

(3) **That at the time of the crime the defendant knew or should have known** (name of person) **was** [mentally incapacitated; physically helpless].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.600(a)

Sexual Battery—Aggravated (Mental Incapacity/ Physical Helplessness)

You have found the defendant guilty of the crime of aggravated sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-67.3(A)(2), 18.2-67.10(3), (4).

CASE AUTHORITY:

Davison v. Commonwealth, 298 Va. 177, 836 S.E.2d 390 (2019); *Robinson v. Commonwealth, 70 Va. App. 509, 514–17, 271–73 (2019)*; *Nicholson v. Commonwealth, 56 Va. App. 491, 507, 694 S.E.2d 788, 796 (2010)*; *Bowden v. Commonwealth, 52 Va. App. 673, 678, 667 S.E.2d 27, 29 (2008)*; *De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007)*; *Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507–08 (2005)*; *McManus v. Commonwealth, 16 Va. App. 310, 311–13, 429 S.E.2d 475, 475–77 (1993)*; *Walker v. Commonwealth, 12 Va. App. 438, 444, 404 S.E.2d 394, 397 (1991)*.

PRACTICE COMMENTARY: In *De'Armond, 51 Va. App. at 33, 654 S.E.2d at 320*, the Court of Appeals of Virginia held that Va. Code Ann. § 18.2-67.3(A) "creates a unit of prosecution for each act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Va. Code Ann. § 18.2-67.10(2)."

Va. Code Ann. § 18.2-67.3(A)(2) covers accomplishing the sexual abuse through use of the complaining witness's mental incapacity or physical helplessness. "Mental incapacity" is defined in Instruction No. 44.320, and "physical helplessness" is defined in Instruction No. 44.340.

Although the jury must be unanimous in finding that that the prosecution proved the elements of the crime, the jury need not agree on the means by which he committed the crime, i.e. whether the act was accomplished through physical helplessness or mental incapacity. *Davison, 298 Va. at 178–79, 836 S.E.2d at 391*.

In *Walker*, the Court of Appeals of Virginia found an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser included offense of sexual battery, Va. Code Ann. § 18.2-67.4. *12 Va. App. at 444, 404 S.E.2d at 397*.

In *Nicholson*, the court found that Va. Code Ann. § 18.2-67.3(A)(2) does not require the use of actual force, but that the sexual abuse, as defined in Va. Code Ann. § 18.2-67.10(6)(b), may be based on constructive force where the touching was accomplished through the complaining witness's mental incapacity. *56 Va. App. at 507, 694 S.E.2d at 796*.

"Sexual abuse" is defined in Instruction No. 48.660.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

• The instructions include four separate versions of the elements under the governing statute. Only the elements fitting the facts of the case should be used. See Instructions Nos. 48.600(a) (Mental Incapacity/ Physical Helplessness), 48.600(b) (Child under 13 Years Old), 48.600(c) (Child at Least 13 Years Old but

Younger than 18 Years Old Assaulted by Relative), 48.600(d) (Massage Therapist/Purporting to be Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing Arts; Physical Therapist/Purporting to be Physical Therapist). In addition, several definitional instructions are provided which, depending on the evidence, may be applicable. See Instruction Nos. 48.605 (Massage Therapist—Defined), 48.610 (Physical Therapy—Defined), 48.615 (Person Practicing or Purporting to Practice the Healing Arts), 48.620 (Healing Arts—Defined), 48.625 (Physical Therapy—Defined), and 48.630 (Practice of Physical Therapy—Defined).

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 678, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.600(b)

Sexual Battery—Aggravated (Child under 13 Years Old)

The defendant is charged with the crime of aggravated sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sexually abused (name of child)**; and**

(2) That at the time of the act (name of child) **was under the age of 13 years.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.600(b)

Sexual Battery—Aggravated (Child under 13 Years Old)

You have found the defendant guilty of the crime of aggravated sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.3(A)(1).

CASE AUTHORITY:

Bowden v. Commonwealth, 52 Va. App. 673, 678, 667 S.E.2d 27, 29 (2008); De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007); Martin v. Commonwealth, 272 Va. 31, 35, 630 S.E.2d 291, 292 (2006); Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507–08 (2005); McManus v. Commonwealth, 16 Va. App. 310, 311–13, 429 S.E.2d 475, 475–77 (1993); Walker v. Commonwealth, 12 Va. App. 438, 444, 404 S.E.2d 394, 397 (1991).

PRACTICE COMMENTARY: In *De'Armond, 51 Va. App. at 33, 654 S.E.2d at 320*, the Court of Appeals of Virginia held that Va. Code Ann. § 18.2-67.3(A) "creates a unit of prosecution for each act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Va. Code Ann. § 18.2-67.10(2)."

Proof of the victim's age establishes the element of constructive force. *Martin, 272 Va. at 35–36, 630 S.E.2d at 292–93.*

In *Walker*, the Court of Appeals of Virginia found an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser included offense of sexual battery, Va. Code Ann. § 18.2-67.4. *12 Va. App. at 444, 404 S.E.2d at 397.*

"Sexual abuse" is defined in Instruction No. 48.660.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

• The instructions include four separate versions of the elements under the governing statute. Only the elements fitting the facts of the case should be used. See Instructions Nos. 48.600(a) (Mental Incapacity/ Physical Helplessness), 48.600(b) (Child under 13 Years Old), 48.600(c) (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative), 48.600(d) (Massage Therapist/ Purporting to be Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing Arts; Physical Therapist/Purporting to be Physical Therapist). In addition, several definitional instructions are provided which, depending on the evidence, may be applicable. See Instruction Nos. 48.605 (Massage Therapist—Defined), 48.610 (Physical Therapy—Defined), 48.615 (Person Practicing or Purporting to Practice the Healing Arts), 48.620 (Healing Arts—Defined), 48.625 (Physical Therapy—Defined), and 48.630 (Practice of Physical Therapy—Defined).

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 678, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.600(c)

Sexual Battery—Aggravated (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative)

The defendant is charged with the crime of aggravated sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sexually abused (name of child)**; and**

(2) That at the time of the act (name of child) **was at least 13 years of age, but younger than 18 years of age; and**

(3) That the defendant is (name of child)**'s** [parent, step-parent, grandparent or step-grandparent]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt one or more of the elements of the crime, then you shall find the defendant guilty. But you shall not let the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.600(c)

Sexual Battery—Aggravated (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative)

You have found the defendant guilty of the crime of aggravated sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.3(A)(3).

CASE AUTHORITY:

Bowden v. Commonwealth, 52 Va. App. 673, 678, 667 S.E.2d 27, 29 (2008); De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007); Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507–08 (2005); McManus v. Commonwealth, 16 Va. App. 310, 311–13, 429 S.E.2d 475, 475–77 (1993); Walker v. Commonwealth, 12 Va. App. 438, 444, 404 S.E.2d 394, 397 (1991).

PRACTICE COMMENTARY: In *De'Armond, 51 Va. App. at 33, 654 S.E.2d at 320*, the Court of Appeals of Virginia held that Va. Code Ann. § 18.2-67.3(A) "creates a unit of prosecution for each act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Va. Code Ann. § 18.2-67.10(2)."

In *Walker*, the Court of Appeals of Virginia found an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser included offense of sexual battery, Va. Code Ann. § 18.2-67.4. *12 Va. App. at 444, 404 S.E.2d at 397.*

"Sexual abuse" is defined in Instruction No. 48.660.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

• The instructions include four separate versions of the elements under the governing statute. Only the elements fitting the facts of the case should be used. See Instructions Nos. 48.600(a) (Mental Incapacity/ Physical Helplessness), 48.600(b) (Child Under 13 Years Old), 48.600(c) (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative), 48.600(d) (Massage Therapist/ Purporting to be Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing Arts; Physical Therapist/Purporting to be Physical Therapist). In addition, several definitional instructions are provided which, depending on the evidence, may be applicable. See Instruction Nos. 48.605 (Massage Therapist—Defined), 48.610 (Physical Therapy—Defined), 48.615 (Person Practicing or Purporting to Practice the Healing Arts), 48.620 (Healing Arts—Defined), 48.625 (Physical Therapy—Defined), and 48.630 (Practice of Physical Therapy—Defined).

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 678, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.600(d)

Sexual Battery—Aggravated (Massage Therapist, Practitioner of Healing Arts, or Physical Therapist)

The defendant is charged with the crime of aggravated sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant sexually abused** (name of person)**; and**

(2) **That the defendant was** [a massage therapist; a person purporting to be a massage therapist; a person practicing the healing arts or a person purporting to practice the healing arts; a physical therapist or a person purporting to be a physical therapist]**; and**

(3) **That the defendant committed the offense during the** [actual; purported] [practice of massage therapy; practice of the healing arts; practice of physical therapy]**; and**

(4) **That the offense is not a recognized form of treatment in the profession; and**

(5) **That** (name of person) **did not give their express consent.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and you have heard further evidence].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. 46.009(d)

Sexual Battery—Aggravated (Massage Therapist Practitioner of Healing Arts or Physical Therapist)

The defendant is charged with the crime of aggravated sexual battery. The [information] [indictment] alleges [in pertinent part] that on or about [date] in [county] [state] [defendant]

(1) That the defendant sexually abused (name of person); and

(2) That the defendant was [a massage therapist; a person purporting to be a massage therapist; a person practicing the healing arts or a person purporting to practice the healing arts; a physical therapist or a person purporting to be a physical therapist]; and

(3) That [as charged] [alleged in the [second] [amended] information] the practice of massage therapy, practice of the healing arts; practice of physical therapy]; and

(4) That the offense is not a recognized form of treatment in the profession; and

(5) That (name of person) did not give their express consent.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and you have heard further evidence].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.600(d)

Sexual Battery—Aggravated (Massage Therapist, Practitioner of Healing Arts or Physical Therapist)

You have found the defendant guilty of the crime of aggravated sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at a specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-67.3(A)(5)(i), (ii), (iii), 54.1-2900, 54.1-2903, 54.1-3000, 54.1-3473.

CASE AUTHORITY:

Bowden v. Commonwealth, 52 Va. App. 673, 678, 667 S.E.2d 27, 29 (2008); *De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007)*; *Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507–08 (2005)*; *McManus v. Commonwealth, 16 Va. App. 310, 311–13, 429 S.E.2d 475, 475–77 (1993)*; *Walker v. Commonwealth, 12 Va. App. 438, 444, 404 S.E.2d 394, 397 (1991)*.

PRACTICE COMMENTARY: In *De'Armond, 51 Va. App. at 33, 654 S.E.2d at 320*, the Court of Appeals of Virginia held that Va. Code Ann. § 18.2-67.3(A) "creates a unit of prosecution for each act of sexual abuse and, at a minimum, contemplates separate acts for each of the separate 'intimate parts' described in Va. Code Ann. § 18.2-67.10(2)."

In *Walker*, the Court of Appeals of Virginia found an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser included offense of sexual battery, Va. Code Ann. § 18.2-67.4. *12 Va. App. at 444, 404 S.E.2d at 397.*

"Sexual abuse" is defined in Instruction No. 48.660.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

• The instructions for aggravated sexual battery include four separate versions of the elements under the governing statute. Only the elements fitting the facts of the case should be used. See Instructions Nos. 48.600(a) (Mental Incapacity/ Physical Helplessness), 48.600(b) (Child Under 13 Years Old), 48.600(c) (Child at Least 13 Years Old but Younger than 18 Years Old Assaulted by Relative), 48.600(d) (Massage Therapist/Purporting to be a Massage Therapist; Person Practicing the Healing Arts/Purporting to be a Person Practicing the Healing Arts; Physical Therapist/Purporting to be Physical Therapist). In addition, several definitional instructions are provided which, depending on the evidence, may be applicable. See Instruction Nos. 48.605 (Massage Therapist—Defined), 48.610 (Physical Therapy—Defined), 48.615 (Practitioner of the Healing Arts), 48.620 (Healing Arts—Defined), 48.625 (Physical Therapy—Defined), and 48.630 (Practice of Physical Therapy—Defined).

• Aggravated sexual battery is not a lesser included offense of forcible sodomy because each offense requires proof of elements not required by the other. *Bowden, 52 Va. App. at 678, 667 S.E.2d at 29.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.605

Massage Therapist—Defined

Massage therapist means a person who meets the qualifications for certification by the Board of Nursing, and who is licensed by the Board of Nursing.

Sources & Authority

Governing Statute:

Va. Code Ann. § 54.1-3000.

Case Authority:

None.

Alerts:

• If the allegation is that the defendant is purporting to be a massage therapist (not licensed by the Board of Nursing), then, presumably, evidence will be presented to show the defendant was holding himself out as a massage therapist. No case law has yet addressed what would be required to establish that a person has held themselves out as practicing massage therapy. One standard the Court may consider adopting is analogous to the standard required for establishing liability for someone who holds themself out as a business partner. See generally *Hobbs v. Virginia Nat. Bank of Petersburg, Va., 147 Va. 802 (1926).*

Instruction No. 48.610

Massage Therapy—Defined

Massage therapy means the treatment of soft tissues for therapeutic purposes by the application of massage and bodywork techniques based on the manipulation or application of pressure to the muscular structure or soft tissues of the human body, not to include manipulation of the spine or joints.

Sources & Authority

Governing Statute:

Va. Code Ann. § 54.1-3000.

Case Authority:

None.

Alerts:

• An element of the offense under Va. Code Ann. § 18.2-67.3(5) is that the "offense is not a recognized form of treatment in the profession." While the actual practice of massage therapy is defined by Va. Code Ann. § 54.1-3000, neither the Code, nor case law, currently defines what conduct could occur "during an actual . . . practice of massage therapy," that would not be a recognized form of treatment in the profession of massage therapy. Additionally, neither the Code, nor case law, presently defines what could constitute a "purported" practice of massage therapy.

• Holding oneself out to be practicing massage therapy without a license is a Class 1 misdemeanor, pursuant to Va. Code Ann. § 54.1-3008(A)(7). There are no cases that cite to any part of that statute. But, presumably, the elements for proving a violation of Va. Ann. Code § 54.1-3008 would also satisfy the "purporting to be" aspect of Va. Ann. Code § 18.2-67.3(5)(i).

• Va. Code Ann. § 54.1-3000 also provides for what is not massage therapy, including manipulation of the spine or joints.

Instruction No. 48.615

Person Practicing the Healing Arts or Purporting to Practice the Healing Arts

A person practicing or purporting to practice the healing arts means a person who [(1) opens an office for such purpose; (2) advertises or announces to the public in any manner a readiness to practice; or (3) uses in connection with his name the words or letters "Doctor," "Dr.," "M.D.," "D.O.," "D.P.M.," "D.C.," "Healer," "N.P.," or any other title, word, letter or designation intending to designate or imply that he is a practitioner of the healing arts or that he is able to heal, cure or relieve those suffering from any injury, deformity or disease].

It shall be sufficient evidence to prove a person is practicing or purporting to practice the healing arts if the person has signed [(1) a birth certificate, except where persons other than physicians are required to sign; (2) a death certificate; (3) any statement certifying that the person has rendered professional service to the sick or injured; or (4) a prescription for drugs or other remedial agents] unless you find the defendant has provided established facts or substantial evidence to the contrary.

Sources & Authority

Governing Statute:

Va. Code Ann. §§ 54.1-2900, 54.1-2903.

Case Authority:

None.

ALERTS:

• Signing a birth certificate, death certificate, statement certifying a rendering of professional service to the sick or injured, or issuing a prescription, pursuant to Va. Code Ann. § 54.1-2903(A), is *prima facie* evidence that a person is practicing, or purporting to practice the healing arts.

Instruction No. 48.620

Healing Arts—Defined

Healing arts means the arts and sciences dealing with the prevention, diagnosis, treatment and cure or alleviation of human physical or mental ailments, conditions, diseases, pain or infirmities.

Sources & Authority

Governing Statute:

Va. Code Ann. §§ 54.1-2900, 54.1-2903.

Case Authority:

None.

ALERTS:

• An element of the offense under Va. Code Ann. § 18.2-67.3(5) is that the "offense is not a recognized form of treatment in the profession." While the actual practice of the healing arts is defined by Va. Code Ann. § 54.1-3000, neither the Code, nor case law, currently defines what conduct could occur "during an actual . . . practice of healing arts," that would not be a recognized form of treatment in the profession of massage therapy. Additionally, neither the Code, nor case law, presently defines what could constitute a "purported" practice of healing arts.

• There is also no guidance in the statute or case law to explain what would be the "purported practice" of the healing arts. Again, practicing select professional categories, falling under the umbrella of "healing arts," is unlawful, pursuant to Va. Code Ann. § 54.1-2902.

Instruction No. 48.625

Physical Therapist—Defined

A physical therapist means any person licensed by the Board of Physical Therapy to engage in the practice of physical therapy.

Sources & Authority

Governing Statute:

Va. Code Ann. § 54.1-3473.

Case Authority:

None.

Alerts:

• Pursuant to Va. Code Ann. § 54.1-3481, it unlawful for any person who is not licensed, or whose license has been suspended or revoked or whose licensure has lapsed and has not been renewed, to use in conjunction with his name letters, words, representations, or insignias to assert or imply that he is a licensed physical therapist.

Instruction No. 48.630

Practice of Physical Therapy—Defined

The practice of physical therapy means, upon medical referral and direction, the evaluation, testing, treatment, reeducation and rehabilitation by physical, mechanical or electronic measures and procedures of individuals who, because of trauma, disease or birth defect, present physical and emotional disorders; and also includes the administration, interpretation, documentation, and evaluation of tests and measurements of bodily functions and structures within the scope of practice of the physical therapist.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 54.1-3473.

CASE AUTHORITY:

None.

ALERTS:

• While the actual practice of physical therapy is defined by Va. Code Ann. § 54.1-3473, neither the Code, nor case law, currently defines what conduct could occur "during an actual . . . practice of physical therapy," that would also not be a recognized form of treatment in the profession of physical therapy. Additionally, neither the Code, nor case law, presently defines what could constitute a "purported" practice of physical therapy.

Instruction No. 48.640

Sexual Battery

The defendant is charged with the crime of sexual battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant sexually abused (name of person)**; and**

(2) That it was against [his; her] **will; and**

(3) That it was by force, threat, intimidation, or ruse.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime then you shall find the defendant not guilty.

Instruction No. P48.640

Sexual Battery

You have found the defendant guilty of the crime of sexual battery.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-67.4, 18.2-11(a).

CASE AUTHORITY:

Robinson v. Commonwealth, 70 Va. App. 509, 828 S.E.2d 269 (2019); De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007); Wilson v. Commonwealth, 46 Va. App. 73, 87–89, 615 S.E.2d 500, 507-08 (2005); Clark v. Commonwealth, 30 Va. App. 406, 409–11, 517 S.E.2d 260, 261–62 (1999); Woodard v. Commonwealth, 27 Va. App. 405, 409–10, 499 S.E.2d 557, 559–60 (1998); Gnadt v. Commonwealth, 27 Va. App. 148, 151–52, 497 S.E.2d 887, 888–89 (1998); Walker v. Commonwealth, 12 Va. App. 438, 444, 404 S.E.2d 394, 397 (1991).

PRACTICE COMMENTARY: "Sexual abuse" is defined in Instruction No. 48.6560.

"Intimate parts" is defined in Instruction No. 48.670.

As to proof of resistance, see Instruction No. 44.620.

Non-consensual touching that is accomplished through surprise rather than intimidation is not sexual battery. *Woodard, 27 Va. App. at 410, 499 S.E.2d at 559.*

In *Walker*, the Court of Appeals of Virginia found that an indictment for aggravated sexual battery, Va. Code Ann. § 18.2-67.3, was broad enough to include a conviction for the lesser-included offense of sexual battery, Va. Code Ann. § 18.2-67.4. *12 Va. App. at 444, 404 S.E.2d at 397.* Additionally, assault and battery is a lesser-included offense of sexual battery. *Gnadt, 27 Va. App. at 151, 497 S.E.2d. at 889.*

In *De'Armond*, the Court of Appeals held that Va. Code Ann. § 18.2-67.3, the aggravated sexual battery statute, creates a separate unit of prosecution for each act of sexual abuse and for each separate intimate part described in Va. Code Ann. § 18.2-67.10(2). *51 Va. App., at 33, 654 S.E.2d, at 320.*

PRACTICE POINTER:

A third conviction under Va. Code Ann. § 18.2-67.4 within ten years is a Class 6 felony. See Va. Code Ann. § 18.2-67.5:1.

ALERTS:

• Va. Code Ann. § 18.2-67.4:2 prohibits an adult from committing an act of sexual abuse, as defined by Va. Code Ann. § 18.2-67.10, upon a child 13 years or older but under 15 years with lascivious intent. The crime is a Class 1 misdemeanor. This section essentially removes the requirement of proof that the offense was committed "by force, threat, intimidation, or ruse" for this protected class of victims.

• Va. Code Ann. § 18.2-67.4(A) (iii) and (iv) proscribe the sexual abuse of inmates in correctional facilities by certain employees of, or volunteers associated

with, such facilities; and of parolees, probationers, pretrial defendants, or posttrial offenders by certain employees and enumerated others in a position of authority over such victims. Under these subdivisions, the sexual abuse need not be accomplished against the will of the victim, or by force, threat, intimidation, or ruse. See Instruction Nos. 48.640 and 48.645.

• In addition, under Va. Code Ann. § 18.2-67.4(A)(ii), a defendant is guilty of sexual battery if he sexually abuses, within a two-year period, more than one complaining witness or one complaining witness on more than one occasion intentionally and without the consent of the complaining witness.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.650

Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender

The defendant is charged with the crime of sexual battery of a(n) [inmate; parolee; probationer; pretrial defendant; posttrial offender]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant sexually abused (name of person) **while** (name of person) **was a(n)** [inmate; parolee; probationer; pretrial defendant; posttrial offender] [committed to jail; convicted and sentenced to confinement in a local, state, or regional correctional facility or jail] **or under the jurisdiction of** [the Department of Corrections; a local community-based probation program; a pretrial services program; a local or regional jail for the purposes of imprisonment; a work program; other parole/probationary or pretrial services program]**; and**

(2) That the defendant was a(n) [employee of; contractual employee of; volunteer with] [a local/regional jail; the Department of Corrections; a local community-based probation program; a pretrial services program] **at the time he sexually abused** (name of person)**; and**

(3) That the defendant was in a position of authority over (name of person) **at the time he sexually abused** (name of person)**; and**

(4) That the defendant knew that (name of person) **was under the jurisdiction of** [a local/regional jail; the Department of Corrections; a local community-based probation program; a pretrial services program]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.650

Sexual Battery of Inmate, Parolee, Probationer, Pretrial Defendant, or Posttrial Offender

You have found the defendant guilty of the crime of sexual battery of a(n) [inmate; parolee; probationer; pretrial defendant; posttrial offender]**.**

Upon consideration of the evidence, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-67.4, 18.2-11(a).

CASE AUTHORITY:

De'Armond v. Commonwealth, 51 Va. App. 26, 33, 654 S.E.2d 317, 320 (2007).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-67.4 as amended makes any sexual abuse of an inmate by a corrections official, as defined in the governing statute, a Class 1 misdemeanor. The act need not be accomplished against complaining witness's will, by force, threat, or intimidation.

In *De'Armond*, the Court held that Va. Code Ann. § 18.2-67.3 creates a separate unit of prosecution for each act of sexual abuse and for each separate intimate part described in Va. Code Ann. § 18.2-67.10(2). *51 Va. App. at 33, 654 S.E.2d at 320.*

"Sexual abuse" is defined in Instruction No. 48.660.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Prisons and Prisoners §§ 2, 5; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.660

Sexual Abuse—Definition

Sexual abuse means an act committed with the intent to sexually molest, arouse, or gratify any person, where the defendant intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.10(6).

CASE AUTHORITY:

Martin v. Commonwealth, 272 Va. 31, 35, 630 S.E.2d 291, 292 (2006); *Walker v. Commonwealth, 12 Va. App. 438, 444–45, 404 S.E.2d 394, 397 (1991).*

PRACTICE COMMENTARY: The governing statute also defines other acts of sexual abuse, including:

(1) forcing the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or the material directly covering such intimate parts, see Va. Code Ann. § 18.2-67.10(6)(b);

(2) causing or assisting a complaining witness under the age of 13 to touch the accused's, the witness's own, or another person's intimate parts or the material directly covering such intimate parts, see Va. Code Ann. § 18.2-67.10(6)(c); or

(3) forcing another person to touch the complaining witness's intimate parts or material covering such intimate parts, see Va. Code Ann. § 18.2-67.10(6)(d).

Where the evidence requires, the instruction should be modified accordingly.

"Intimate parts" is defined in Instruction No. 48.670.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Infants and Juveniles § 89; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.660

Intimate Parts—Definition

"Intimate parts" means the genitalia, anus, groin, breast, or buttocks of any person.

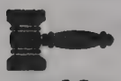
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-67.10(2).

CASE AUTHORITY:

None.



PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.670

Threat of Force—Definition

Threat of force means expression of an intention to do bodily harm or to use force. It is not shown by intimidation.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Martin v. Commonwealth, 272 Va. 31, 35, 630 S.E.2d 291, 292 (2006); Clark v. Commonwealth, 30 Va. App. 406, 411–12, 517 S.E.2d 260, 262 (1999); Morse v. Commonwealth, 17 Va. App. 627, 633–38, 440 S.E.2d 145, 149–52 (1994); Sutton v. Commonwealth, 228 Va. 654, 663, 324 S.E.2d 665, 669–70 (1985).

PRACTICE COMMENTARY: In the context of sexual crimes, "an act undertaken against a victim's will and without the victim's consent is an act undertaken with force" and the term "force" includes "actual and constructive force." *Martin, 272 Va. at 35, 630 S.E.2d at 292.*

"[C]onstructive force exists if the victim could not legally consent to the act," as in cases where the victim is under the age of consent. *Martin, 272 Va. at 35, 630 S.E.2d at 292.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.675

Intimidation—Definition

Intimidation means putting a victim in fear of bodily harm by exercising such domination and control of [him; her] **as to overcome** [his; her] **mind and overbear** [his; her] **will.**

[Intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure.]

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Cairns v. Commonwealth, 40 Va. App. 271, 294–96, 579 S.E.2d 340, 351–52 (2003); Sabol v. Commonwealth, 37 Va. App. 9, 18, 553 S.E.2d 533, 537 (2001); Clark v. Commonwealth, 30 Va. App. 406, 409–11, 517 S.E.2d 260, 261–62 (1999); Woodard v. Commonwealth, 27 Va. App. 405, 409–10, 499 S.E.2d 557, 559–60 (1998); Morse v. Commonwealth, 17 Va. App. 627, 633–38, 440 S.E.2d 145, 149–52 (1994); Sutton v. Commonwealth, 228 Va. 654, 663, 324 S.E.2d 665, 669–70 (1985).

PRACTICE COMMENTARY: This instruction features an optional second paragraph, which is appropriate for use when the victim, due to circumstances then existing, is vulnerable and particularly susceptible to the psychological pressure exerted by the defendant.

Intimidation is not established where the evidence shows that sexual abuse was accomplished abruptly and by surprise, with no time for the victim to either reflect upon or submit to the defendant's conduct. *Woodard, 27 Va. App. at 410, 499 S.E.2d at 559.*

Fear of the possibility of bodily injury caused by sexual assault is sufficient fear of bodily harm for purposes of establishing sexual assault by intimidation. In other words, "proof that the victim feared some type of bodily harm other than the harm inherent in the sexual assault is not required." Factors "such as the victim's age, the relative size of the defendant and the victim, and the familial relationship between the defendant and the victim are relevant matters to be considered in determining whether the victim was put in fear of bodily harm." *Cairns, 40 Va. App. at 294, 579 S.E.2d at 351.*

"Fear of bodily harm must derive from some conduct or statement of the accused." *Sabol v. Commonwealth, 37 Va. App. at 18, 553 S.E.2d at 537.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, Virginia Criminal Law and Procedure §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and other Sexual Offenses, §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.680

Consent

Consent by (name of person) **is an absolute bar to conviction of** (name of sexual assault crime)**. If, after consideration of all the evidence, you have a reasonable doubt as to whether** (name of person) **consented to** (name of sexual assault crime) **with the defendant, then you shall find him not guilty.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Gonzales v. Commonwealth, 45 Va. App. 375, 381–83, 611 S.E.2d 616, 619–20 (2005); Commonwealth v. Minor, 267 Va. 166, 173–74, 591 S.E.2d 61, 66 (2004); Morse v. Commonwealth, 17 Va. App. 627, 633–38, 440 S.E.2d 145, 149–52 (1994).

PRACTICE COMMENTARY: Consent concerns only the victim's state of mind. Whether the defendant intended to commit the offenses without the victim's consent is not relevant. *Minor, 267 Va. at 174, 591 S.E.2d at 66.* See *Gonzales, 45 Va. App. at 382, 611 S.E.2d at 619.*

ALERTS:

• A trial court is required to instruct the jury on the definition of consent where sufficient evidence exists to present that issue to the jury and it is clear that the defendant wishes the jury to be so instructed, even if the defendant's proffered instruction misstates the law. *Morse, 17 Va. App. at 637, 440 S.E.2d at 151.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.700

Prostitution—General

The defendant is charged with the crime of prostitution. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [had sexual intercourse; performed cunnilingus; performed fellatio; performed anilingus; engaged in anal intercourse; touched the unclothed genitals or anus of another person with the intent to sexually arouse or gratify; allowed another to touch his unclothed genitals or anus with the intent to sexually arouse or gratify] **with another person not his spouse; and**

(2) **That it was for** [money; money's equivalent].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.700

Prostitution—General

You have found the defendant guilty of the crime of prostitution.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-346, 18.2-346.01.

CASE AUTHORITY:

Bakran v. Commonwealth, 57 Va. App. 197, 201-05, 700 S.E.2d 471, 473–74 (2010); Fine v. Commonwealth, 31 Va. App. 636, 640–42, 525 S.E.2d 69, 70-71 (2000); Golden v. Commonwealth, 30 Va. App. 618, 623, 519 S.E.2d 378, 380 (1999); McFadden v. Commonwealth, 3 Va. App. 226, 229–30, 348 S.E.2d 847, 848–49 (1986); Adams v. Commonwealth, 215 Va. 257, 258, 208 S.E.2d 742, 743 (1974).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-346 defines prostitution as the offer to commit sexual intercourse or sodomy for money or its equivalent, coupled with any substantial act in furtherance thereof. See Instruction No. 48.720; see also *Adams, 215 Va. at 258, 208 S.E.2d at 743.*

The statute also includes the acts prohibited by Va. Code Ann. § 18.2-361, i.e., bestiality and incest.

Va. Code Ann. § 18.2-346.01 provides that any person who offers money or its equivalent to another person for the purpose of engaging in the sexual acts enumerated in Va. Code Ann. § 18.2-346, and thereafter does any substantial act in furtherance thereof, shall be guilty of solicitation of prostitution, a Class 1 misdemeanor. However, one who solicits prostitution from a minor 16 years or older shall be guilty of a Class 6 felony, and one who solicits prostitution from a minor younger than 16 years of age shall be guilty of a Class 5 felony.

ALERTS:

- The governing statutes are gender neutral.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Disorderly Houses and Houses of Ill Fame §§ 1–9; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.720

Prostitution—Attempt

The defendant is charged with the crime of prostitution. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant offered to** [have sexual intercourse; perform cunnilingus; perform fellatio; perform anilingus; engage in anal intercourse; touch the unclothed genitals or anus of another person with the intent to sexually arouse or gratify; allow another to touch his unclothed genitals or anus with the intent to sexually arouse or gratify] **with another person who was not** [his; her] **spouse; and**

(2) **That it was for** [money; money's equivalent]**; and**

(3) **That after the offer the defendant did a substantial act toward** [having the sexual intercourse; committing one of the acts listed above].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.720

Prostitution—Attempt

You have found the defendant guilty of the crime of attempted prostitution.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. §§ 18.2-346, 18.2-346.01.

CASE AUTHORITY:

Bakran v. Commonwealth, 57 Va. App. 197, 201–05, 700 S.E.2d 471, 473–74 (2010); Fine v. Commonwealth, 31 Va. App. 636, 640–42, 525 S.E.2d 69, 70–71 (2000); Golden v. Commonwealth, 30 Va. App. 618, 623, 519 S.E.2d 378, 380 (1999); McFadden v. Commonwealth, 3 Va. App. 226, 229–30, 348 S.E.2d 847, 848–49 (1986); Adams v. Commonwealth, 215 Va. 257, 258, 208 S.E.2d 742, 743 (1974).

PRACTICE COMMENTARY: Va. Code Ann. § 18.2-346 also includes the acts prohibited by Va. Code Ann. § 18.2-361, i.e., bestiality and incest.

Va. Code Ann. § 18.2-346.01 provides that any person who offers money or its equivalent to another person for the purpose of engaging in the sexual acts enumerated in Va. Code Ann. § 18.2-346, and thereafter does any substantial act in furtherance thereof, shall be guilty of solicitation of prostitution, a Class 1 misdemeanor. However, one who solicits prostitution from a minor 16 years or older shall be guilty of a Class 6 felony, and one who solicits prostitution from a minor younger than 16 years of age shall be guilty of a Class 5 felony.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Attempts and Solicitation" and "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Disorderly Houses and Houses of Ill Fame §§ 1–9; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.800

Bawdy Place—Keeping or Visiting

The defendant is charged with the crime of [keeping; visiting; residing in] **a bawdy place. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [kept; visited; resided in] **a bawdy place; and**

(2) That it was for immoral purposes.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P48.800

Bawdy Place—Keeping or Visiting

You have found the defendant guilty of the crime of [keeping; visiting; residing in] **a bawdy place.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-347.

CASE AUTHORITY:

Harrison v. City of Norfolk, 16 Va. App. 572, 574–75, 431 S.E.2d 658, 659–60 (1993); Trent v. Commonwealth, 181 Va. 338, 340, 25 S.E.2d 350, 351 (1943); Wilson v. Commonwealth, 132 Va. 824, 827, 111 S.E. 96, 97 (1922).

PRACTICE COMMENTARY: The purpose of the governing statute is obvious: The Commonwealth wishes to do all that is possible to suppress commercial prostitution. *Trent, 181 Va. at 340, 25 S.E.2d at 351.*

In a predecessor statute, the Commonwealth bore the burden of proving the defendant's knowledge that illegal practices are carried on in such a place. *Bennett v. Commonwealth, 182 Va. 7, 11, 28 S.E.2d 13, 14 (1943).*

When a defendant has been charged under this governing statute, the Commonwealth does not have to prove that his place has a reputation for being bawdy. The Commonwealth must prove only that the defendant's place is bawdy in fact. The purpose of the law is to deter prostitution and lewdness; it is not concerned with the general reputation of a place. See *Wilson, 132 Va. at 827, 111 S.E. at 97.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Disorderly Houses and Houses of Ill Fame §§ 1–9; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.850

Bawdy Place—Definition

A "bawdy place" is any place within or outside any building or structure that is used or is to be used for lewdness, assignation, or prostitution.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-347.

CASE AUTHORITY:

Harrison v. City of Norfolk, 16 Va. App. 572, 574–75, 431 S.E.2d 658, 659–60 (1993); Trent v. Commonwealth, 181 Va. 338, 340, 25 S.E.2d 350, 351 (1943).

PRACTICE COMMENTARY: A "bawdy house" is synonymous with a "house of ill fame." However, the "place" does not have to be a house; it can be a boat on a river, a single room, or a canvas tent. *Trent, 181 Va. at 341, 25 S.E.2d at 351.* It may include the parking lot of a motel. *Harrison, 16 Va. App. at 575, 431 S.E.2d at 660.*

"Assignation," as used in this model instruction, refers to "an appointment of time and place for a meeting . . . for illicit sexual relations." Webster's Third New Int'l Dictionary 132.

ALERTS:

• Not every house or place in which illicit sexual intercourse takes place is "bawdy." It must be a place where one may frequently go for immoral purposes, or where one may go for such purposes without invitation. *Trent, 181 Va. at 343, 25 S.E.2d at 352.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Disorderly Houses and Houses of Ill Fame §§ 1–9; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

Instruction No. 48.860

Keeping—Definition

"Keeping" means owning, maintaining, managing, or operating a place with knowledge of the illegal activities going on.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Warshaw v. City of Norfolk, 190 Va. 862, 866, 58 S.E.2d 884, 886 (1950); Bennett v. Commonwealth, 182 Va. 7, 12, 28 S.E.2d 13, 15 (1943).

PRACTICE COMMENTARY: The courts have pointed out that in order to do justice to a defendant charged with the crime of keeping a bawdy place, knowledge on his or her part is a crucial element of the offense:

> Unless we read into the ordinance and the governing statute that such use must be with the knowledge of the keeper, persons might be convicted of a violation of the governing statute or ordinance without ever having known that the hotel, apartment or rooming house was being used or to be used for the purpose of illicit sexual intercourse.

Warshaw, 190 Va. at 866, 58 S.E.2d at 885.

However, the defendant's knowledge may be established by circumstantial as well as by direct evidence. Circumstantial evidence may be important to show that the defendant was generally aware of the activities that occurred at his or her place:

> A proprietor should be diligent to see that his entertainments are not destructive of morality, or infected with indecency. He is not permitted to shut his eyes to occurrences that it is his duty to prevent, and find safety in a claim of ignorance.

Bennett, 182 Va. at 12, 28 S.E.2d at 15 (quoting *Pope v. Commonwealth, 131 Va. 776, 794, 109 S.E. 429, 435 (1921)*).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Sex Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 5.1–5.20, 18.7

MICHIE'S JURISPRUDENCE, Disorderly Houses and Houses of Ill Fame §§ 1–9; Rape and Other Sexual Offenses §§ 1–27; and Sodomy §§ 1–4

CHAPTER 49

TRESPASS AND RELATED OFFENSES

Scope Note

Instruction No. 49.100 Trespass After Having Been Forbidden to Do So

Instruction No. P49.100 Trespass After Having Been Forbidden to Do So

Instruction No. 49.120 Trespass in Violation of Court Order

Instruction No. P49.120 Trespass in Violation of Court Order

Instruction No. 49.130 Trespass on Posted Property

Instruction No. P49.130 Trespass on Posted Property

Instruction No. 49.200 Entrance Onto Property to Damage It or Its Contents

Instruction No. P49.200 Entrance Onto Property to Damage It or Its Contents

Instruction No. 49.210 Definition of the Term Disability

Instruction No. 49.300 Peeping or Spying Into Structure Occupied as Dwelling

Instruction No. P49.300 Peeping or Spying Into Structure Occupied as Dwelling

Instruction No. 49.310 Peeping or Spying—Circumstances of Privacy

Instruction No. P49.310 Peeping or Spying—Circumstances of Privacy

Instruction No. 49.400 Common Law Trespass to Realty

Instruction No. P49.400 Common Law Trespass to Realty

Instruction No. 49.450 Breach of Peace

Instruction No. 49.500 Claim of Right (Trespass)

SCOPE NOTE

The following instructions cover some of the principal offenses related to trespass, peeping and spying.

Instruction Nos. 49.100 to 49.200 address different types of statutory trespass. Instruction No. 49.100, based on Va. Code Ann. § 18.2-119, covers trespass after having been forbidden to do so. Instruction No. 49.120, also based on Va. Code Ann. § 18.2-119, covers trespass in violation of a court order. Instruction No. 49.130, based on Va. Code Ann. §§ 18.2-134 and 18.2-134.1, deals with trespass on posted property to hunt, fish, or trap. Instruction No. 49.200, based on Va. Code Ann. § 18.2-121, addresses cases where the defendant enters the property of another for the purpose of damaging it, or to interfere with the rights to use such property free from interference. Instruction No. 49.210 sets forth the definition of the term "disability" under the felony offense defined under Va. Code Ann. § 18.2-121. Instruction No. 49.300, based on Va. Code Ann. § 18.2-130(A), covers peeping or spying into structures or enclosures occupied as dwellings. Instruction No. 49.300 may be modified to cover an alleged violation of Va. Code Ann. § 18.2-130.1 (peeping or spying by electronic device). Instruction No. 49.310, based on Va. Code Ann. § 18.2-130(B), covers peeping or spying into other specific areas in which the victim has a reasonable expectation of privacy.

Instruction No. 49.400 covers the crime of common law trespass, which is still recognized in Virginia.

Instruction No. 49.450 defines the term "breach of the peace" and should be used in conjunction with Instruction No. 49.400.

Trespass upon church or school property, although not the subject of an Instruction, is covered by Va. Code Ann. § 18.2-128. Trespass with an unmanned aircraft system (e.g., drone), although not the subject of an Instruction, is covered by Va. Code Ann. § 18.2-121.3.

Instruction No. 49.500 covers the defense of claim of right.

The Practice Commentary following Instruction Nos. P49.100, P49.130, P49.200, and P49.400 contains citations for inclusion of "willfulness" as an essential element of statutory trespass and for its definition within the context of a particular case.

Instruction No. 49.100

Trespass After Having Been Forbidden to Do So

The defendant is charged with the crime of trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant** [went on; remained on] **the** [land; buildings; premises] **of another; and**

(2) **That he did so willfully; and**

(3) **That the defendant had been forbidden to do so, orally or in writing, by the** [owner; lessee; custodian; agent of the owner, lessee, custodian; person lawfully in charge] **or by a sign posted on such** [land; buildings; premises] **by or at the direction of** [such persons; the agent of any such person] **at a place where such sign may reasonably be seen.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the above elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.100

Trespass After Having Been Forbidden to Do So

You have found the defendant guilty of trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-119.

Case Authority:

Baker v. Commonwealth, 278 Va. 656, 660–63, 685 S.E.2d 661, 663–65 (2009); *O'Banion v. Commonwealth, 33 Va. App. 47, 55–57, 531 S.E.2d 599, 603–04 (2000), overruled in part on other grounds by Harris v. Commonwealth, 274 Va. 409, 415, 650 S.E.2d 89, 91 (2007)*; *Commonwealth v. Hicks, 267 Va. 573, 583, 596 S.E.2d 74, 79 (2004)*; *Jones v. Commonwealth, 18 Va. App. 229, 232, 443 S.E.2d 189, 190–91 (1994)*; *Miller v. Commonwealth, 10 Va. App. 472, 473–76, 393 S.E.2d 431, 431–33 (1990)*; *Reed v. Commonwealth, 6 Va. App. 65, 70–71, 366 S.E.2d 274, 278 (1988)*; *Johnson v. Commonwealth, 212 Va. 579, 581–82, 186 S.E.2d 53, 55–56 (1972)*.

Practice Commentary: The statute governing trespass "applies to publicly owned property other than thoroughfares." *Johnson, 212 Va. at 582, 186 S.E.2d at 56*. "The term 'thoroughfare,' as used by the Court in *Johnson*, is limited to those ways or passages designated for general public access." *Miller, 10 Va. App. at 475, 393 S.E.2d at 433*.

The Commonwealth must prove either oral or written notice of the proscription against entry or that one of the persons authorized by Va. Code Ann § 18.2-119 to prohibit entry onto the land posted a "no trespassing" sign. *Baker, 278 Va. at 662, 685 S.E.2d at 664*.

Willfulness Requirement. The criminal trespass statutes are uniformly construed to require a willful act of trespass. *Jones, 18 Va. App. at 232, 443 S.E.2d at 191*. "Criminal intent is an essential element of . . . trespass, even though the statute is silent as to intent . . . ." *Reed, 6 Va. App. at 71, 366 S.E.2d at 278*. "[The] correct application [of willfully] in a particular case will generally depend upon the character of the act involved and the attending circumstances." *Hunter v. Commonwealth, 15 Va. App. 717, 721, 427 S.E.2d 197, 200 (1993)*.

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful.

Lambert v. Commonwealth, 6 Va. App. 360, 363, 367 S.E.2d 745, 746 (1988).

Defenses. A defendant cannot be convicted of trespass where the act complained of was done under a bona fide claim of right. *O'Banion, 33 Va. App. at 55–57, 531 S.E.2d at 603–04; Reed, 6 Va. App. at 71, 366 S.E.2d at 278*. See also *Jones, 18 Va. App. at 232, 443 S.E.2d at 191*. Instruction No. 49.500 covers claim of right.

Necessity is not a defense to a charge of trespass when reasonable and legal alternatives to the violation of law exist. *Buckley v. City of Falls Church, 7 Va. App.*

32, 33, 371 S.E.2d 827, 827 (1988) (discussing anti-abortionists' entry in medical clinic).

Lesser Included Offenses. Trespass in violation of Va. Code Ann. § 18.2-119 is not a lesser included offense of statutory burglary under Va. Code Ann. § 18.2-91. *Lowe v. Commonwealth, 33 Va. App. 583, 590–92, 535 S.E.2d 689, 692–93 (2000).*

☞ ***PRACTICE POINTER:***

"[T]he holder of an easement or other right-of-way authorized by the instrument creating such interest to post [such] signs" may also prohibit entry. Va. Code Ann. § 18.2-119.

☞ ***PRACTICE POINTER:***

See Va. Code Ann. § 18.2-128(B), which makes it a crime to fail to leave the premises of a school when directed to do so.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.3

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 49.120

Trespass in Violation of Court Order

The defendant is charged with the crime of trespass in violation of a court order. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [went on; remained on] **the** [land; buildings; premises] **after having been prohibited from doing so by order of a court; and**

(2) That the defendant had been served with a copy of such order.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Trespass in Violation of Court Order

The defendant is charged with the crime of trespass in violation of a court order. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [complained of] the [land/premises] above having been prohibited from doing so by order of a court; and

(2) That the defendant had been served with a copy of such order.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty; but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime charged, you shall find the defendant not guilty.

Instruction No. P49.120

Trespass in Violation of Court Order

You have found the defendant guilty of the crime of trespass in violation of a court order.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-119.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Trespass in violation of Va. Code. Ann. § 18.2-119 is not a lesser included offense of statutory burglary under Va. Code Ann. § 18.2-91. *Lowe v. Commonwealth, 33 Va. App. 583, 590–92, 535 S.E.2d 689, 692–93 (2000).*

ALERTS:

• ***Willfulness Requirement.*** The Virginia appellate courts have not expressly held that willfulness is an essential element of this particular category of statutory trespass under the provisions of Va. Code Ann. § 18.2-119. The criminal trespass statutes, however, are uniformly construed to require willful acts of trespass. *Jones v. Commonwealth, 18 Va. App. 229, 232, 443 S.E.2d 189, 191 (1994)*; *Reed v. Commonwealth, 6 Va. App. 65, 70–71, 366 S.E.2d 274, 278 (1988).* "[The] correct application [of willfully] in a particular case will generally depend upon the character of the act involved and the attending circumstances." *Hunter v. Commonwealth, 15 Va. App. 717, 721, 427 S.E.2d 197, 200 (1993).*

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful.

• *Lambert v. Commonwealth, 6 Va. App. 360, 363, 367 S.E.2d 745, 746 (1988).*

• "Willfulness" has not expressly been included as an element in Instruction No. 49.120, because, under the circumstances, it may be inherent in the act of violating a served court order prohibiting trespass. The word "willfully" may be inserted just after the word "defendant" in element (1) of Instruction 49.120, however, should the jury need to be instructed on that issue.

• ***Claim of Right.*** The Virginia appellate courts have not been called upon to decide whether or not a claim of right defense would be applicable to this particular statutory offense.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.3

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 49.130

Trespass on Posted Property

The defendant is charged with the crime of trespass on posted property. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant willfully went on the** [lands; waters; ponds; boats; blinds] **of another to hunt, fish or trap; and**

(2) **That he neither had the written consent of, nor was he in the presence of, the owner or his agent; and**

(3) **That the** [lands; waters; ponds; boats; blinds] **were posted by the owner or lessee:** [by placing signs prohibiting hunting, fishing or trapping where they may reasonably be seen; by placing identifying (Insert type and color of paint as prescribed by the Department of Wildlife Resources) paint marks, each consisting of a vertical line of at least two (2) inches in width and at least eight (8) inches in length with the center of each mark no less than three (3) feet nor more than six (6) feet from the ground or normal water surface, on trees or posts at each road entrance and adjacent to public roadways and public waterways adjoining the property, and such marks were readily visible to any person approaching the property].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Trespass on Posted Property

The Commonwealth's charge with the crime of trespass on posted property. The Commonwealth must prove, beyond a reasonable doubt, each of the following elements of that crime:

(1) That the defendant entered upon the [lands; waters; ponds; boats; blinds] of another person;

(2) That the [lands; waters; ponds; boats; blinds] were posted by the owner or lessee [by placing signs prohibiting hunting, fishing or trapping where they may be seen from any point of ingress to the premises] [by placing signs prohibiting hunting, fishing or trapping on the premises] [by the placement of written or printed notice thereof] [by the placement of fluorescent paint] [by the placement of purple paint marks] [by the placement of a vertical line of at least two (2) inches in width and at least eight (8) inches in length with the center of each mark no less than three (3) feet nor more than six (6) feet from the ground or normal water surface, or both] [by the placement of purple paint marks on trees or posts] [by the placement of purple paint marks on posts at each corner and at each point of ingress and egress to the property];

(3) That the defendant did not have the permission of the owner or lessee to enter upon the property.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty; but you shall not fix the punishment until you have heard all the evidence and instructions for [that] [them].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.130

Trespass on Posted Property

You have found the defendant guilty of the crime of trespass on posted property.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statutes:

Va. Code Ann. §§ 18.2-134, 18.2-134.1. The Department of Game and Inland Fisheries was renamed Department of Wildlife Resources. Va. Code Ann. § 18.2-134.1(B).

Case Authority:

None.

Practice Commentary:

Willfulness Requirement. The Virginia criminal trespass statutes are uniformly construed to require a willful act of trespass. *Jones v. Commonwealth, 18 Va. App. 229, 232, 443 S.E.2d 189, 191 (1994); Reed v. Commonwealth, 6 Va. App. 65, 70–71, 366 S.E.2d 274, 278 (1988).* "[The] correct application [of willfully] in a particular case will generally depend upon the character of the act involved and the attending circumstances." *Hunter v. Commonwealth, 15 Va. App. 717, 721, 427 S.E.2d 197, 200 (1993).*

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful.

Lambert v. Commonwealth, 6 Va. App. 360, 363, 367 S.E.2d 745, 746 (1988).

Methods of Posting. Element (3) of this offense is that the lands, waters, ponds, boats or blinds be posted. Pursuant to the provisions of Va. Code Ann. § 18.2-134, the required posting must be in accordance with the provisions of Va. Code Ann. §18.2-134.1. That section of the Code establishes two methods for posting. Those methods are set forth as options under element (3). Either or both options may be applicable in a particular case. If only one option is applicable, the other may be eliminated from the instruction.

Pursuant to Va. Code Ann. § 18.2-134.1(B), the type and color of the paint used for the marks in the second option of element (3) must be as prescribed by the Department of Wildlife Resources. The Department of Wildlife Resources has from time to time prescribed different types and colors of paint for this purpose. The regulations of the Department in effect at the time of the offense therefore must be reviewed to ascertain the applicable type and color. Once ascertained, it should be inserted in place of the parenthetical language set out in the second option of element (3). If there is no issue as to the type and color of the paint used, that portion of the instruction may be eliminated.

Va. Code Ann. § 18.2-132.1 prohibits the intentional, nonconsensual release of hunting dogs on the lands of another which have been posted in accord with the provisions of Va. Code Ann. § 18.2-134.1. The offense is a Class 3 misdemeanor. *Id.* A second or subsequent violation within three years is a Class 1 misdemeanor

and requires the court to revoke the offender's hunting or trapping license for one year. *Id.*

If a person goes on the unposted lands, waters, ponds, boats, or blinds of another to hunt, fish or trap without the consent of the landowner or his agent, he is guilty of violating Va. Code Ann. § 18.2-132, a Class 3 misdemeanor.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.3

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 49.200

Entrance Onto Property to Damage It or Its Contents

The defendant is charged with the crime of entering property of another for the purpose of damaging [it; its contents]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant willfully entered the [land; dwelling; outhouse; building] **owned, used or occupied by another; and**

(2) That the defendant entered for the purpose of damaging [the land; the dwelling; the outhouse; the building; the contents of the property].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Entrance Onto Property to Damage It or Its Contents

The defendant is charged with the crime or entering property of another for the purpose of damaging [it, its contents]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant willfully entered the [land; dwelling; outhouse; building] owned, used or occupied by another; and

(2) That the defendant entered for the purpose of damaging [the land; the dwelling; the outhouse; the building; the contents of the property].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty. [If, however, you believe that the Commonwealth has proved beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.200

Entrance Onto Property to Damage It or Its Contents

You have found the defendant guilty of the crime of entering property of another for the purpose of damaging [it; its contents].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-121.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: ***Willfulness Requirement.*** The Virginia criminal trespass statutes are uniformly construed to require a willful act of trespass. *Jones v. Commonwealth, 18 Va. App. 229, 232, 443 S.E.2d 189, 191 (1994); Reed v. Commonwealth, 6 Va. App. 65, 70–71, 366 S.E.2d 274, 278 (1988).* "[The] correct application [of willfully] in a particular case will generally depend upon the character of the act involved and the attending circumstances." *Hunter v. Commonwealth, 15 Va. App. 717, 721, 427 S.E.2d 197, 200 (1993).*

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful.

Lambert v. Commonwealth, 6 Va. App. 360, 363, 367 S.E.2d 745, 746 (1988).

Va. Code Ann. § 18.2-121 also prohibits entry onto property for the purpose of interference with rights of usage. If the defendant is charged under this theory, the first paragraph of this instruction and elements (1) and (2) should be modified as follows:

The defendant is charged with the crime of entering property of another for the purpose of interfering with the right of the lawful [owner; user; occupant] **of the property to** [use it; use its contents]. **The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) **That the defendant willfully entered the** [land; dwelling; outhouse; building] **that was lawfully** [owned; used; occupied] **by another; and**

(2) **That the defendant entered for the purpose of interfering with the right of the lawful** [owner; user; occupant] **to use** [the land; the dwelling; the outhouse; the building; the contents of the property].

PRACTICE POINTER:

A violation of Va. Code Ann. § 18.2-121 is not a lesser included offense of either Va. Code Ann. §§ 18.2-90 or 18.2-91. *Crump v. Commonwealth, 13 Va. App. 286, 290–91, 411 S.E.2d 238, 241 (1991).*

ALERTS:

• Va. Code Ann. § 18.2-121 makes it a Class 6 felony if the defendant intentionally selected the property entered because of the race, religious conviction, color, gender, disability, gender identity, sexual orientation, or national origin of the owner, user or occupant of the property and the penalty upon conviction

shall include a term of confinement of at least six months. This instruction may be modified accordingly.

[The General Assembly in 2020 amended Va. Code Ann. § 18.2-121 to define "disability" as meaning a physical or mental impairment that substantially limits one or more of a person's major life activities.]

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.3

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 49.210

Definition of the Term Disability

The Term "disability" means a physical or mental impairment that substantially limits one or more of a person's major life activities.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-121 (as amended and enacted in 2020).

PRACTICE COMMENTARY: This instruction would be offered only if the offense is charged as a "Hate Crime" under Va. Code Ann. § 18.2-121 and is enhanced to a Class 6 felony.

Instruction No. 49.300

Peeping or Spying Into Structure Occupied as Dwelling

The defendant is charged with the crime of [peeping; spying; attempting to peep; attempting to spy] into a structure occupied as a dwelling. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **[That the defendant entered upon the property of another; That the defendant entered without just cause upon property owned by him and leased or rented to another under circumstances that would violate the occupant's reasonable expectation of privacy] and**

(2) **That the defendant** [secretly; furtively] [peeped; spied; attempted to peep; attempted to spy] [through; into][a window; a door; an opening] **of** [a building; a structure; an enclosure] **and**

(3) **That such** [building; structure; enclosure] **was** [occupied; intended for occupancy] **as a dwelling.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.300

Peeping or Spying Into Structure Occupied as Dwelling

You have found the defendant guilty of the crime of [peeping; spying; attempting to peep; attempting to spy] into a structure occupied as a dwelling.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-130(A).

CASE AUTHORITY:

Morales v. Commonwealth, 31 Va. App. 541, 544–45, 525 S.E.2d 23, 24–25 (2000); Copeland v. Commonwealth, 31 Va. App. 512, 516, 525 S.E.2d 9, 11 (2000).

PRACTICE COMMENTARY: As used in Va. Code Ann. § 18.2-130, "dwelling" includes structures that are either permanently situated or transportable, and that are occupied either permanently or temporarily.

The defendant need not be "wholly hidden from view" in order to satisfy the "secretly" or "furtively" element of this offense. Rather, those terms mean the act of surreptitious peeping with the intent to invade the privacy of those inside the dwelling. *Morales, 31 Va. App. at 545, 525 S.E.2d at 25; Copeland, 31 Va. App. at 516, 525 S.E.2d at 11.*

This Instruction may be modified to cover the crime of peeping or spying into a dwelling or occupied building by electronic device in violation of Va. Code Ann. § 18.2-130.1.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Privacy (Offenses Against)" and "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 19.4[1]

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 2; and Right to Privacy § 1

Instruction No. 49.310

Peeping or Spying—Circumstances of Privacy

The defendant is charged with the crime of [peeping; spying; attempting to peep; attempting to spy]. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) **That the defendant used a peephole or other opening to secretly or furtively** [peep; spy; attempt to peep; attempt to spy] **into a** [restroom; dressing room; locker room; hotel room; motel room; tanning bed; tanning booth; bedroom; or other location or enclosure]; **and**

(2) **That his purpose in doing so was the viewing of a nonconsenting person who was** [totally nude; clad in undergarments; in a state of undress exposing the genitals, pubic area, buttocks or female breast]; **and**

(3) **The circumstances were such that the nonconsenting person had a reasonable expectation of privacy.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.310

Peeping or Spying—Circumstances of Privacy

You have found the defendant guilty of the crime of [peeping; spying; attempting to peep; attempting to spy].

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-130(B).

CASE AUTHORITY:

None.

PRACTICE COMMENTARY:

None.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Privacy (Offenses Against)" and "Trespass and Related Crimes"

MICHIE'S JURISPRUDENCE, Adultery, Fornication and Lewdness § 2; and Right to Privacy § 1

Instruction No. 49.400

Common Law Trespass to Realty

The defendant is charged with the crime of trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant made an entry upon the [land; premises] **of another; and**

(2) That the entry was unauthorized; and

(3) That such unauthorized entry upon the [land; premises] **of another was made under such circumstances or in such a manner as to** [constitute a breach of the peace; threaten a breach of the peace]**.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Common Law Trespass to Realty

The defendant is charged with the crime of trespass. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

(1) That the defendant [illegible]

and

(2) That the party [illegible]

(3) That such unauthorized entry upon the land; premises [illegible] was made under such circumstances or in such a manner as to [illegible] a breach of the peace; threaten a breach of the peace].

If you find [from the evidence that the Commonwealth] has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you must find the defendant guilty. But you [illegible] unless you find that the aforesaid verdict has been returned and [where evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

Instruction No. P49.400

Common Law Trespass to Realty

You have found the defendant guilty of the crime of trespass.

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Taylor v. Commonwealth, 11 Va. App. 649, 400 S.E.2d 794 (1991); Snead v. Commonwealth, 212 Va. 803, 804, 188 S.E.2d 197, 198 (1972); Miller v. Harless, 153 Va. 228, 244, 149 S.E. 619, 624 (1929); Henderson v. Commonwealth, 49 Va. (8 Gratt.) 708 (1852).

PRACTICE COMMENTARY: Va. Code Ann. § 1-200 provides: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." Further, Schedule Section 3 of the Constitution of Virginia provides that, so far as they are not in conflict, the common and statutory law in force as of July 1, 1971 shall remain in force until they expire of their own limitation or are altered or repealed by the General Assembly. In addition, case law lends support to the well-settled notion that the common law continues in force in Virginia except as otherwise altered by statute. See, e.g., *Midkiff v. Midkiff, 201 Va. 829, 831, 113 S.E.2d 875, 876 (1960); Brown v. Brown, 183 Va. 353, 355, 32 S.E.2d 79, 80 (1944).*

The punishment for common law trespass to realty is derived from consideration of four statutes. First, Va. Code Ann. § 18.2-8 provides that offenses are either felonies or misdemeanors. Felonies are those offenses which may be punished with confinement in a state correctional facility. *Forbes v. Commonwealth, 90 Va. 550, 552, 19 S.E. 164, 165 (1894); Benton v. Commonwealth, 89 Va. 570, 572, 16 S.E. 725, 725 (1893).* Whatever is not a felony is a misdemeanor. *Commonwealth v. Callaghan, 4 Va. 460, 462 (1825).* Since the Code of Virginia does not establish confinement in a state correctional facility as punishment for common law trespass to realty, the offense is a misdemeanor. Second, Va. Code Ann. § 18.2-12 mandates that a "misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punish[ed] as a Class 1 misdemeanor." Third, Va. Code Ann. § 18.2-11(a) authorizes punishment for Class 1 misdemeanors. Finally, Va. Code Ann. § 18.2-16 states that a "common-law offense, for which punishment is prescribed by statute, shall be punished only in the [manner] so prescribed."

A guilty plea to trespass doesn't negate a conviction for statutory burglary. A person is guilty of statutory burglary if he breaks and enters an occupied dwelling house with the intent to commit any misdemeanor, except for those listed, to include trespass. Va. Code Ann. § 18.2-92. However, the trial court did not err by finding a defendant guilty of statutory burglary after accepting defendant's guilty plea to trespass, when the evidence showed that defendant intended to commit another misdemeanor when he entered the residence. *Green v. Commonwealth*, 72

Va. App. 193, 201, 843 S.E.2d 389, 393 (2020).

ALERTS:

Willfulness Requirement. Statutory criminal trespass uniformly is construed to require a willful act of trespass. *Jones v. Commonwealth, 18 Va. App. 229, 232, 443 S.E.2d 189, 191 (1994)*; *Reed v. Commonwealth, 6 Va. App. 65, 70–71, 366 S.E.2d 274, 278 (1988).* Common law trespass does not appear to have a similar willfulness requirement, since at common law a willful trespass, standing alone, was not a crime, although it was subject to civil action.

Breach of the Peace. Trespass "is a crime at common law if it amounts to a breach of the peace, or if it tends to or threatens a breach of the peace." *Miller, 153 Va. at 244, 149 S.E. at 624.* It is only where circumstances attending a trespass constitute a breach of the peace, such as entering a dwelling house with offensive weapons, that trespass is heightened into a public offense and becomes the subject of criminal prosecution. *Henderson, 49 Va. (8 Gratt.) at 710.* See also *Taylor, 11 Va. App. 649, 653, 400 S.E.2d 794, 796; Snead, 212 Va. at 804, 188 S.E.2d at 198; Commonwealth v. Powell, 35 Va. 719 (1837).*

Lesser Included Offenses. Common law trespass is not a lesser included offense of statutory burglary under Va. Code Ann. § 18.2-91. *Taylor, 11 Va. App. at 654, 400 S.E.2d at 796–97.*

ALERTS:

- Use Instruction No. 49.450, Breach of Peace to define breach of the peace.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 9.3

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 49.450

Breach of Peace

Peace is the tranquility enjoyed by the citizens of a community. A breach of the peace is an act of disturbing the public peace, or a violation of public order or public decorum. It is not necessary for there to be an act of personal violence to constitute a breach of peace.

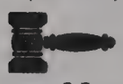
SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Hudson v. Commonwealth, 266 Va. 371, 379–80 & n.6, 585 S.E.2d 583, 587–88 & n.6 (2003); *Byrd v. Commonwealth, 158 Va. 897, 902–03, 164 S.E. 400, 402 (1932).*



PRACTICE COMMENTARY:

None.

ALERTS:

• Use this instruction with Instruction No. 49.400, Common Law Trespass to Realty.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Disorderly Conduct and Places"

MICHIE'S JURISPRUDENCE, Breach of the Peace §§ 1–8; and Trespass § 27

Instruction No. 49.500

Claim of Right (Trespass)

If you find from the evidence that the defendant believed he had a good faith claim of right to enter onto the property, even though this belief was mistaken, you shall find the defendant not guilty of trespass. A good faith claim of right is a sincere, although perhaps mistaken, good faith belief that one has a legal right to be on the property. The claim need not be of title or ownership of the property, but it must rise to the level of authorization.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

O'Banion v. Commonwealth, 33 Va. App. 47, 55–57, 531 S.E.2d 599, 603–04 (2000), overruled in part on other grounds by Harris v. Commonwealth, 274 Va. 409, 415, 650 S.E.2d 89, 91 (2007); Reed v. Commonwealth, 6 Va. App. 65, 71, 366 S.E.2d 274, 278 (1988).

PRACTICE COMMENTARY: See the Practice Commentary to Instruction No. 52.200, Claim of Right.

PRACTICE POINTER:

For an alternate general instruction on the defense of claim of right, see Instruction No. 52.200, Claim of Right.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Ignorance/Mistake of Fact or Law" and "Trespass and Related Crimes"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 9.3, 34.1, 34.2, 34.6, 34.7

MICHIE'S JURISPRUDENCE, Trespass § 27

CHAPTER 50

UNAUTHORIZED USE OF PUBLIC BENEFITS OFFENSES

Scope Note

Instruction No. 50.100 **Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs**

Instruction No. P50.100(a) **Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs (Grand Larceny)**

Instruction No. P50.100(b) **Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs (Petit Larceny)**

Instruction No. 50.200 **Making False Representation to Obtain Public Assistance or Benefits**

Instruction No. P50.200(a) **Making False Representation to Obtain Public Assistance or Benefits (Grand Larceny)**

Instruction No. P50.200(b) **Making False Representation to Obtain Public Assistance or Benefits (Petit Larceny)**

Instruction No. 50.300 **Failure to Notify Local Department of Social Services of Changes in Circumstances**

Instruction No. P50.300(a) **Failure to Notify Local Department of Social Services of Change in Circumstances (Grand Larceny)**

Instruction No. P50.300(b) **Failure to Notify Local Department of Social Services of Change in Circumstances (Petit Larceny)**

SCOPE NOTE

Unauthorized use of public assistance benefits programs is prohibited by Va. Code Ann. § 63.2-523. Violations of Va. Code Ann. § 63.2-523 are deemed larceny. See Instruction No. 50.100, which is drafted to cover unauthorized use of food stamps, unauthorized use of electronic benefit transfer cards, and unauthorized energy assistance program benefits. The governing statute should be consulted regarding unauthorized use of the public assistance programs addressed therein.

Aiding and abetting another in obtaining unauthorized use of public assistance benefits programs is also prohibited by Va. Code Ann. § 63.2-523. No instructions have been drafted for the aiding and abetting provisions of Va. Code Ann. § 63.2-523.

Instruction Nos. 50.200 and 50.300 cover the most common crimes associated with welfare fraud, and are based on Va. Code Ann. §§ 63.2-522 and 63.2-513. Instruction No. 50.200 covers making a false representation to obtain aid, and Instruction No. 50.300 covers failure to report a change in condition.

Instruction No. 50.100

Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs

The defendant is charged with the crime of (name of crime)**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant knowingly:

[(a) transferred; acquired; altered; trafficked in; used [food stamps; electronic benefit transfer cards; benefits from energy assistance programs]; or

[(b) possessed [food coupons; authorization to purchase cards; benefits from energy assistance programs; (specify benefits card listed in Va. Code Ann. § 63.2-523)]]; **and**

(2) That the defendant did so with the intent to defraud; and

(3) That the defendant did so in a manner not authorized by law; and

(4) That the amount involved was $1,000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of (name of crime) **as grand larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but you do not find beyond a reasonable doubt that the value of all [food stamps; electronic benefit transfer cards; benefits from energy assistance programs; (name other Va. Code § 63.2-523 benefit)] [transferred; acquired; altered; trafficked in; possessed; used] **by the defendant exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value, then you shall find the defendant guilty of** (name of crime) **as petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first two elements of the crime, or that such [food stamps; electronic benefit transfer cards; benefits from energy assistance programs; (name other Va. Code § 63.2-523 benefit)] **were of some value, then you shall find the defendant not guilty.**

Instruction No. 56.100

[illegible] Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs

[illegible]

(1) That the defendant knowingly:

(a) [illegible] transferred, acquired, altered, [illegible] food stamps; electronic benefit transfer cards; benefits from energy assistance programs; or

(b) [illegible] [illegible] and

(2) That the defendant did so with the intent to defraud; and

(3) That the defendant did so in a manner not authorized by law; and

(4) That the amount involved was $1,000 or more.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the three elements of the crime as charged, then you shall find the defendant guilty of (name of crime) as grand larceny. [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but you do not find beyond a reasonable doubt that the value of all [food stamps; electronic [illegible] the defendant exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value, then you shall find the defendant guilty of (name of crime) as petit larceny. [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first two elements of the crime, or that such [food stamps; electronic benefit transfer cards; benefits from energy assistance programs; (name other Va. Code § 63.2-523 benefit)] were of some value, then you shall find the [illegible].

Instruction No. P50.100(a)

Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs (Grand Larceny)

You have found the defendant guilty of the crime of (name of crime) **as grand larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. 9.23.120(a)

Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs (Grand Larceny)

You have found the defendant guilty of the crime of (name of crime as grand larceny).

Upon consideration of all the evidence you have heard, you shall fix the punishment at

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P50.100(b)

Unauthorized Use of Food Stamps, Electronic Benefit Transfer Cards, or Energy Assistance Programs (Petit Larceny)

You have found the defendant guilty of the crime of (name of crime) **as petit larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 63.2-523, 18.2-95, 18.2-96.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: Whether the charge is grand larceny or petit larceny will depend on the dollar amount involved in the fraud. See Va. Code Ann. §§ 18.2-95 and 18.2-96.

ALERTS:

• Note that there is no apparent preclusion to charging misusers of the public benefits programs listed under Va. Code Ann. § 63.2-523 under the welfare fraud governing statute, Va. Code Ann. § 63.2-522.

• ***Proof of Some Value or Utility.*** At common law, to be the subject of larceny, an article must be of some non-zero value. It is sufficient "if it be worth less than the smallest coin known to the law." *Wolverton v. Commonwealth, 75 Va. 909, 913 (1881)*; *see also Pierce v. Commonwealth, 205 Va. 528, 532, 138 S.E.2d 28, 31 (1964).*

The Supreme Court of Virginia has also specifically held that "[u]nder settled Virginia law, no proof need be adduced to show that the subject of petit larceny has a specific value." *Evans v. Commonwealth, 226 Va. 292, 297, 308 S.E.2d 126, 129 (1983)*; *Wright v. Commonwealth, 196 Va. 132, 82 S.E.2d 603 (1954).*

For a discussion of additional principles and cases concerning valuation, see the Practice Commentary to Instruction No. 36.100.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving" and "Public Assistance Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–18

Instruction No. 50.200

Making False Representation to Obtain Public Assistance or Benefits

The defendant is charged with the crime of making false representation to obtain public [assistance; benefits]**. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:**

(1) That the defendant [obtained; attempted to obtain; aided or abetted another in obtaining] **public** [assistance; benefits] **to which he was not entitled by means of a** [willful false statement or representation; impersonation; fraudulent device]**; and**

(2) The act was with the intent to defraud; and

(3) That the [assistance; benefits] [received; sought] **was of the value of $1,000 or more.**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of (name of crime) **as grand larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but you do not find beyond a reasonable doubt that the value of all [assistance; benefits] [received; sought] **by the defendant exceeded $1,000, and if you find beyond a reasonable doubt that such items were of some value, then you shall find the defendant guilty of** (name of crime) **as petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first two elements of the crime, or that such [assistance; benefits] **were of some value, then you shall find the defendant not guilty.**

Instruction No. P50.200(a)

Making False Representation to Obtain Public Assistance or Benefits (Grand Larceny)

You have found the defendant guilty of the crime of (name of crime) **as grand larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P26.200(a)

You have found the defendant guilty of the crime of (name of crime) as charged in (number).

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P50.200(b)

Making False Representation to Obtain Public Assistance or Benefits (Petit Larceny)

You have found the defendant guilty of the crime of (name of crime) **as petit larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 63.2-522, 18.2-95, 18.2-96.

CASE AUTHORITY:

Jefferson v. Commonwealth, 833 S.E.2d 462, 467, 2019 Va. LEXIS 134, 15–17 (2019); *Burrell v. Commonwealth, 50 Va. App. 72, 86–87, 646 S.E.2d 35, 42 (2007).*

PRACTICE COMMENTARY: Whether the charge is grand larceny or petit larceny will depend on the dollar amount involved in the fraud. For respective amounts, see Va. Code Ann. §§ 18.2-95 and 18.2-96.

☞ ***PRACTICE POINTER:***

See Va. Code Ann. § 18.2-186.2, which deals with making false statements in writing and failure to disclose material facts in order to obtain aid or benefits under any local, state or federal housing assistance program.

See Va. Code Ann. § 18.2-186.3, which deals with using the identifying information of another person to obtain benefits of such other person.

For an explanation of the relationship between Va. Code Ann. § 63.2-522 and the larceny statutes, Va. Code Ann. §§ 18.2-95 and 18.2-96, see *Jefferson v. Commonwealth.* The *Jefferson* opinion also addresses valuation in this context. *Jefferson v. Commonwealth, 833 S.E.2d 462, 2019 Va. LEXIS 134, 15–17 (2019).*

ALERTS:

• For discussions of principles and cases concerning valuation, see the Practice Commentary to Instruction Nos. 36.100 and 50.100.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving" and "Public Assistance Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–18

Instruction No. 50.300

Failure to Notify Local Department of Social Services of Changes in Circumstances

The defendant is charged with the crime of failure to notify the local Department of Social Services of change in circumstances. The Commonwealth must prove beyond a reasonable doubt the following elements of that crime:

(1) That the defendant willfully failed to notify the local Department of Social Services of a change in circumstances which he knew or reasonably should have known would materially affect his eligibility for assistance or the amount thereof; and

(2) That the act was with intent to defraud; and

(3) That thereafter the defendant received public assistance of a value of $1,000 or more to which he was not entitled.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime, then you shall find the defendant guilty of (name of crime) **as grand larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the crime as charged but you do not find beyond a reasonable doubt that the value of public assistance received by the defendant exceeded $1,000, and if you find beyond a reasonable doubt that such assistance was of some value (there need be no proof of a minimum or specific value)**, then you shall find the defendant guilty of** (name of crime) **as petit larceny, [but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you].**

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the first two elements of the crime, or that such public assistance was of some value, then you shall find the defendant not guilty.

[illegible]

[illegible]

[illegible]

Instruction No. P50.300(a)

Failure to Notify Local Department of Social Services of Change in Circumstances (Grand Larceny)

You have found the defendant guilty of (name of crime) **as grand larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Failure to Notify Local Department of Social Services of Change in Circumstances (Grand Larceny)

You have found the defendant guilty of (name of crime) *as grand larceny.*

Upon consideration of [*a*] *the evidence* [*and their arrest*] *you may fix the defendant's punishment at:*

(1) A specific term of imprisonment, but not less than one (1) year nor more than twenty (20) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Instruction No. P50.300(b)

Failure to Notify Local Department of Social Services of Change in Circumstances (Petit Larceny)

You have found the defendant guilty of (name of crime) **as petit larceny.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTES:

Va. Code Ann. §§ 63.2-513, 63.2-522, 18.2-95, 18.2-96.

CASE AUTHORITY:

Burrell v. Commonwealth, 50 Va. App. 72, 86–87, 646 S.E.2d 35, 42 (2007); *Brooks v. Commonwealth, 220 Va. 405, 406–07, 258 S.E.2d 501, 506 (1979).*

PRACTICE COMMENTARY: See Practice Commentary following Instruction No. 50.200.

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Larceny and Receiving" and "Public Assistance Offenses"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 10.1–10.18

MICHIE'S JURISPRUDENCE, Larceny §§ 1–18

CHAPTER 51

[RESERVED]

CHAPTER 52

DEFENSES—GENERAL

Scope Note

Instruction No. 52.100 Alibi

Instruction No. 52.200 Claim of Right

Instruction No. 52.300 Duress

Instruction No. 52.400 Entrapment

Instruction No. 52.500 Self-Defense—Defendant Without Fault

Instruction No. 52.510 Self-Defense—Defendant With Fault—Retreat to Wall

Instruction No. 52.515 Defense of Property

Instruction No. 52.520 Right to Arm

Instruction No. 52.525 Self-Defense—Presentation of or Brandishing a Firearm (Right to Threaten Force)

Instruction No. 52.530 Accident

SCOPE NOTE

The general instructions are: Instruction No. 52.100 on alibi; Instruction No. 52.200 on claim of right; Instruction No. 52.300 on duress; Instruction No. 52.400 on entrapment; Instruction No. 52.520 on right to arm; and Instruction No. 52.530 on accident. Instruction No. 52.515 addresses the right of a defendant to use reasonable force in defense of property.

Two general self-defense instructions are provided: Instruction No. 52.500 (defendant without fault) and Instruction No. 52.510 (defendant with fault). These instructions are adapted from the self-defense to homicide instructions in Chapter 33.

Instruction No. 52.525 addresses the right of a defendant to point, hold, or brandish a firearm when he is without fault in provoking or bringing on an incident.

Effective July 1, 2021, Va. Code Ann. § 19.2-271.6(B) allows the admission of evidence of mental illness short of insanity to rebut the Commonwealth's proof of intent. The statute makes evidence of mental illness, developmental disability, intellectual disability, and autism spectrum disorder potentially admissible, if relevant to the defendant's intent and otherwise admissible. Instruction 53.170 addresses this potential defense.

Defense of impossibility: "Legal impossibility occurs when a defendant's actions, even if fully carried out exactly as he intends, would not constitute a crime. Factual impossibility occurs when the action intended by a defendant are proscribed by the criminal law, but a circumstance or fact unknown to the defendant prevents him from bringing about the intended result." *Hix v. Commonwealth, 270 Va. 335, 342, 619 S.E.2d 80, 84 (2005).* While legal impossibility may be a defense, factual impossibility is not. *Hix, 270 Va. at 344, 619 S.E.2d at 85.* See Instruction No. 8.180.

Instructions on defenses to specific crimes have been placed with the substantive crimes.

No instruction is provided for a reasonable reliance due process defense. Virginia law recognizes such a defense. If it would be appropriate to give an instruction on that defense, *Davis v. Commonwealth*, 68 Va. App. 725, 813 S.E.2d 547 (2018) discusses the elements and burdens of proof for the defendant who is asserting a reasonable reliance due process defense. If the defense should apply, an appropriate instruction should be drafted.

Instruction No. 52.100

Alibi

The defendant relies upon the defense that he was not present at the time and place the alleged crime was committed. If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged crime was committed, you shall find him not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

PRINCIPAL CASE AUTHORITY:

Cooper v. Commonwealth, 277 Va. 377, 385–86, 673 S.E.2d 185, 189–90 (2009); *Bassett v. Commonwealth, 222 Va. 844, 856–57, 284 S.E.2d 844, 853 (1981).*

OTHER RELEVANT DECISIONS:

Johnson v. Commonwealth, 210 Va. 16, 20, 168 S.E.2d 97, 100 (1969).

PRACTICE COMMENTARY: This instruction was approved by the Supreme Court in *Cooper, 277 Va. at 385–86, 673 S.E.2d at 189–90* and *Bassett, 222 Va. at 856–57, 284 S.E.2d at 852.*

Alibi is a defense. An alibi instruction must be given where there is evidence that the defendant was not at the scene of the crime at the exact time or for the entire period during which it was or could have been committed. *Cooper, 277 Va. at 385–86, 673 S.E.2d at 189–90*; *Johnson v. Commonwealth, 210 Va. at 20, 168 S.E.2d at 100.*

The continuing validity of cases indicating "that when the jury is properly instructed on the presumption of innocence and reasonable doubt, a separate instruction on alibi is neither necessary nor required," (e.g., *Crabbe v. Commonwealth, 221 Va. 419, 421, 270 S.E.2d 727, 728 (1980), Minor v. Commonwealth, 213 Va. 278, 281,191 S.E.2d 825, 827 (1972)*, and *Draper v. Commonwealth, 132 Va. 648, 660–665, 111 S.E. 471, 475–76 (1922)*) has been called into serious doubt by the holding and supporting discussion in *Cooper, 277 Va. at 381–86, 673 S.E.2d at 187–90.*

PRACTICE POINTER:

If the court orders pretrial discovery pursuant to Va. Sup. Ct. R. 3A:11, then upon motion by the Commonwealth, an alibi defense must be disclosed pretrial by the defense. *Cooper, 277 Va. at 385, 673 S.E.2d at 190*; Va. Sup. Ct. R. 3A:11(c)(2).

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Alibi"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 34.8

MICHIE'S JURISPRUDENCE, Alibi § 2

Instruction No. 52.200

Claim of Right

If you believe the defendant [took the property he is charged with stealing; converted to his own use the property he is charged with embezzling; took the property in the robbery with which he is charged; engaged in (name criminal activity)] **under a belief that he had a good faith claim of right to** [take it; engage in that activity], **then, even though his belief was mistaken, you shall find the defendant not guilty of** [larceny; larceny by embezzlement; robbery; (name criminal activity)].

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Groves v. Commonwealth, 50 Va. App. 57, 63–64, 646 S.E.2d 28, 31 (2007); Lawson v. Commonwealth, 35 Va. App. 610, 617, 547 S.E.2d 513, 516 (2001); O'Banion v. Commonwealth, 33 Va. App. 47, 56–57, 531 S.E.2d 599, 603–04 (2000), overruled in part on other grounds by Harris v. Commonwealth, 274 Va. 409, 415, 650 S.E.2d 89, 91 (2007); Strohecker v. Commonwealth, 23 Va. App. 242, 257, 475 S.E.2d 844, 852 (1996); Reed v. Commonwealth, 6 Va. App. 65, 71, 366 S.E.2d 274, 278 (1988); Butts v. Commonwealth, 145 Va. 800, 811–12, 133 S.E. 764, 767–68 (1926).

PRACTICE COMMENTARY: The principle reflected in the instruction is discussed at length in *Butts*: "If A, with criminal intent, takes the pistol of B, and breaks it to pieces, so that it is worthless, A is guilty of the larceny of B's pistol. If, however, . . . A, in good faith, believes it belongs to him, although the taking is by trespass, yet he is not guilty of larceny by destroying it, because there was no criminal intent on A's part to deprive B permanently of a pistol that belonged to him, but to destroy what A, in good faith, believed to be his own property." *145 Va. at 812, 133 S.E. at 768*. In other words, "a bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right" to engage in the challenged activity. "The claim need not be one of title or ownership, but it must rise to the level of authorization." *O'Banion, 33 Va. App. at 56, 531 S.E.2d at 603*; see also *Reed, 6 Va. App. at 71, 366 S.E.2d at 278*.

Whether the defendant acted in good faith is usually a question for the jury. As *Butts* makes clear, the question is one of law for the court when reasonable persons can only fairly draw one conclusion from the undisputed facts.

This instruction can be used in cases of larceny, robbery, trespass, property damage, and embezzlement where the defense is one of good faith claim of right. However, it is not a defense if the defendant is charged with extortion. See *Strohecker*. Otherwise, "[t]o refuse an instruction propounding this legal principle, when there is evidence to support it, is error." *O'Banion, 33 Va. App. at 56, 531 S.E.2d at 603*.

☞ ***PRACTICE POINTER:***

For an alternate instruction in a trespass case, see Instruction No. 49.500.

ALERTS:

• As indicated in *Alexander*, a property owner may not use or threaten to use deadly force to protect property. *Commonwealth v. Alexander, 260 Va. 238, 242, 531 S.E.2d 567, 569 (2000).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Ignorance/Mistake of Fact or Law"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 34.1, 34.2, 34.6, 34.7

MICHIE'S JURISPRUDENCE, Trespass § 27

Instruction No. 52.300

Duress

If you find from the evidence that the defendant acted under duress, then you must find him not guilty. In order for the defendant to use the defense of duress, you must find from the evidence that he was threatened and that he had a reasonable fear of imminent death or serious bodily injury. The defense of duress is not available if the defendant had a reasonable opportunity to escape and did not do so, or if he had a reasonable opportunity to avoid committing the crime without being harmed.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Edmonds v. Commonwealth, 292 Va. 301, 306–08, 787 S.E.2d 860, 862–63 (2016); Small v. Commonwealth, 292 Va. 292, 299–300, 788 S.E.2d 702, 705–06 (2016); Arnold v. Commonwealth, 37 Va. App. 781, 787–88, 560 S.E.2d 915, 918 (2002); Graham v. Commonwealth, 31 Va. App. 662, 674, 525 S.E.2d 567, 573 (2000); Zelenak v. Commonwealth, 25 Va. App. 295, 300, 487 S.E.2d 873, 875 (1997); Sam v. Commonwealth, 13 Va. App. 312, 322, 411 S.E.2d 832, 837 (1991); Pancoast v. Commonwealth, 2 Va. App. 28, 33, 340 S.E.2d 833, 836 (1986).

PRACTICE COMMENTARY: To support a defense of duress, the defendant "ha[s] to demonstrate that her criminal conduct was the product of [an] unlawful threat that caused her reasonably to believe that performing the criminal conduct was her only reasonable opportunity to avoid imminent death or serious bodily harm, either to herself or another." *Zelenak, 25 Va. App. at 300, 487 S.E.2d at 875*. See also *Daung Sam v. Commonwealth, 13 Va. App. 312, 324, 411 S.E.2d 832, 839 (1991).*

The defense of duress may also be available to a defendant who has committed a criminal act because of threats made against members of his family. *Daung Sam, 13 Va. App. at 323, 411 S.E.2d at 838–39*. In such cases, the instruction should be modified accordingly.

☞ ***PRACTICE POINTER:***

Duress is generally not a defense to murder. *Arnold, 37 Va. App. at 788, 560 S.E.2d at 918.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Duress"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 32.1, 32.5

MICHIE'S JURISPRUDENCE, Duress and Undue Influence, §§ 9–12

Instruction No. 52.400

Entrapment

Entrapment is the origination and planning of a crime by an officer of the law and his procurement of its commission by one who would not have committed it except for the trickery, persuasion or fraud of the officer. Where a person intends to and does commit the crime, the fact that officers of the law provided a favorable opportunity for, aided or encouraged the commission of the crime is not entrapment.

If you believe:

(1) That the defendant had no previous intent or purpose to commit the crime; and

(2) That an officer of the law, directly or through his agents, originated in the mind of the defendant the idea to commit the crime; and

(3) That an officer of the law, directly or through his agents, caused the defendant to commit the crime by trickery, persuasion or fraud,

then you shall find the defendant not guilty even though you may believe from the evidence that he consented to the commission of the crime.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Schneider v. Commonwealth, 230 Va. 379, 381–82, 337 S.E.2d 735, 736–37 (1985); Stamper v. Commonwealth, 228 Va. 707, 715, 324 S.E.2d 682, 687 (1985); Huffman v. Commonwealth, 222 Va. 823, 828–829, 284 S.E.2d 837, 840 (1981); Cogdill v. Commonwealth, 219 Va. 272, 279, 247 S.E.2d 392, 396 (1978); Neighbors v. Commonwealth, 214 Va. 18, 19, 197 S.E.2d 207, 208–09 (1973); Swift v. Commonwealth, 199 Va. 420, 424, 100 S.E.2d 9, 12–13 (1957); Guthrie v. Commonwealth, 171 Va. 461, 466, 198 S.E. 481, 483 (1938); Falden v. Commonwealth, 167 Va. 549, 554–56, 189 S.E. 329, 331–32 (1937).

PRACTICE COMMENTARY: There is no statute in Virginia regarding the defense of entrapment. However, the cases cited above clearly outline the elements of the defense and describe the evidence required to submit the question to a jury.

The essence of the defense is that the defendant did not originate the intent to commit the crime and that, but for the intervention of the law enforcement officers, he would not have committed the crime. Thus, the defense is a function of the general rule that law enforcement officers are not permitted to generate in the mind of a person the original intent to commit a criminal act which the person would not commit without such inducements.

When officers of the law or their agents aid or encourage the commission of acts constituting the crime, but do not originate the criminal intent, the defense of entrapment is not available. As illustrated in *Falden, Cogdill* and *Stamper*, if the criminal intent originates in the mind of the accused, the fact that an opportunity is furnished or that the accused is aided by police in the commission of the crime in order that they might obtain evidence against him, does not constitute entrapment.

ALERTS:

• It is for the trial court to determine whether there is sufficient evidence to submit the issue of entrapment to the jury. In considering this question, in accord with the standards discussed in *Neighbors* and *Cogdill*, the judge must view the evidence "in the light most favorable to the theory of entrapment." The majority of the Virginia cases, however, affirm the refusal of trial courts to allow the defense or to submit the question to the jury. As stated in *Swift*, "[i]t is error to give an instruction, though correct as an abstract statement of law, unless there is sufficient evidence in the record to support it." *199 Va. at 424, 100 S.E.2d at 13.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Entrapment"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 32.2

MICHIE'S JURISPRUDENCE, Criminal Procedure § 8

Instruction No. 52.500

Self-Defense—Defendant Without Fault

If you believe that the defendant was without fault in provoking or bringing on the [fight; difficulty]**, and you further believe that:**

(1) he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of bodily harm; and

(2) he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm,

then he acted in self-defense, and you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

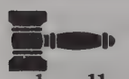
None.

PRINCIPAL CASE AUTHORITY:

Lienau v. Commonwealth, 69 Va. App. 254, 818 S.E.2d 58 (2018), aff'd en banc, 69 Va. App. 780, 823 S.E.2d 43 (2019); *Avent v. Commonwealth, 279 Va. 175, 202–03, 688 S.E.2d 244, 259 (2010); Commonwealth v. Cary, 271 Va. 87, 99, 623 S.E.2d 906, 912 (2006); Foster v. Commonwealth, 13 Va. App. 380, 383–85, 412 S.E.2d 198, 200–01 (1991); Delacruz v. Commonwealth, 11 Va. App. 335, 338–39, 398 S.E.2d 103, 105–06 (1990); Diffendal v. Commonwealth, 8 Va. App. 417, 420–22, 382 S.E.2d 24, 25–26 (1989); Perricllia v. Commonwealth, 229 Va. 85, 93–94 326 S.E.2d 679, 684–85 (1985).*

OTHER RELEVANT DECISIONS:

Caison v. Commonwealth, 52 Va. App. 423, 440, 663 S.E.2d 553, 561–62 (2008); *Couture v. Commonwealth, 51 Va. App. 239, 251, 656 S.E.2d 425, 431 (2008); Hughes v. Commonwealth, 43 Va. App. 391, 403–04, 598 S.E.2d 743, 749 (2004); Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001); Graham v. Commonwealth, 31 Va. App. 662, 672, 525 S.E.2d 567, 572 (2000)*; *Bailey v. Commonwealth, 200 Va. 92, 96, 104 S.E.2d 28, 31 (1958).*



PRACTICE COMMENTARY: This instruction should be given when no deadly force is used. When deadly force is used, give Instruction No. 33.800. The Supreme Court of Virginia approved instructions on self-defense similar to the model instruction in *Perricllia, 229 Va. at 93–94, 326 S.E.2d at 684–85*.

A person in reasonable apprehension of bodily harm by another is privileged to exercise reasonable force to repel the assault, but the amount of force must be reasonable in relation to the perceived threat. *Diffendal, 8 Va. App. at 421, 382 S.E.2d at 25–26.*

Deadly force is justified only when there is an overt threat indicative of imminent danger and the defendant reasonably feared death or serious bodily injury from the victim. *Caison, 52 Va. App. at 423, 663 S.E.2d at 561–62.*

In *Foster*, the Court held that the law pertaining to defense of others applies in Virginia where a defendant reasonably believes, based on the attendant circumstances, that the person defended is in danger of death or great bodily harm and was without fault in provoking the fray. *Foster, 13 Va. App. at 386, 412 S.E.2d at 202.*

ALERTS:

• In order for the perceived danger to be "imminent," there must be some "overt act" on the part of the victim indicative of immediate danger at the time. *Sands, 262 Va. at 729, 553 S.E.2d at 736.*

• There is a "legal principle that when a party is assaulted in his own home, that party, as a homeowner (or tenant, as the case may be) has the right to use whatever means necessary to repel the aggressor, even to the taking of life." *Hines v.*

Commonwealth, 292 Va. 674, 681, 791 S.E.2d 563, 566 (2016); *Fortune v. Commonwealth, 133 Va. 669, 687, 112 S.E. 861, 867 (1922)* (discussing the "Defense of the Castle" doctrine). The Supreme Court of Virginia went on to say that the defendant in *Hines* had used "appropriate force."

• The defendant was entitled to a self-defense instruction based on evidence that the decedent, with whom the defendant had a negative history, violently had broken into the defendant's house in the dark of night, irrespective of the defendant's statement that he felt rage due to the home invasion. *Lienau, 69 Va. App. at 267–69, 818 S.E.2d at 64–65.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 33.1–33.7

MICHIE'S JURISPRUDENCE, Homicide §§ 39–45

Instruction No. 52.510

Self-Defense—Defendant With Fault—Retreat to Wall

If you believe that the defendant was to some degree at fault in provoking or bringing on the [fight; difficulty]**, but you further believe that:**

(1) he retreated as far as he safely could under the circumstances in a good faith attempt to abandon the fight; and

(2) he made known his desire for peace by word or act; and

(3) he reasonably feared, under the circumstances as they appeared to him, that he was in imminent danger of bodily harm; and

(4) he used no more force, under the circumstances as they appeared to him, than was reasonably necessary to protect himself from the perceived harm,

then he acted in self-defense, and you shall find the defendant not guilty.

Sources & Authority

Governing Statute:

None.

Principal Case Authority:

Bell v. Commonwealth, 66 Va. App. 479, 486–89, 788 S.E.2d 272, 275–77 (2016); Cortez-Hernandez v. Commonwealth, 58 Va. App. 66, 81, 706 S.E.2d 893, 901 (2011); Avent v. Commonwealth, 279 Va. 175, 202–03, 688 S.E.2d 244, 259 (2010); Commonwealth v. Cary, 271 Va. 87, 99, 623 S.E.2d 906, 912 (2006); Foster v. Commonwealth, 13 Va. App. 380, 383–85, 412 S.E.2d 198, 200–01 (1991); Delacruz v. Commonwealth, 11 Va. App. 335, 338–39, 398 S.E.2d 103, 105–06 (1990); Diffendal v. Commonwealth, 8 Va. App. 417, 420–22, 382 S.E.2d 24, 25–26 (1989); Perricllia v. Commonwealth, 229 Va. 85, 93–94 326 S.E.2d 679, 684–85 (1985).

Other Relevant Decisions:

Caison v. Commonwealth, 52 Va. App. 423, 440, 663 S.E.2d 553, 561–62 (2008); Couture v. Commonwealth, 51 Va. App. 239, 251, 656 S.E.2d 425, 431 (2008); Hughes v. Commonwealth, 43 Va. App. 391, 403–04, 598 S.E.2d 743, 749 (2004); Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001); Smith v. Commonwealth, 17 Va. App. 68, 71, 435 S.E.2d 414, 416 (1993).

Practice Commentary: This instruction should be given when no deadly force is used. When deadly force is used, give Instruction No. 33.810.

A person in reasonable apprehension of bodily harm by another may exercise reasonable force to repel the assault, but the amount of force must be reasonable in relation to the perceived threat. *Diffendal, 8 Va. App. at 421, 382 S.E.2d at 25–26.*

Deadly force is justified only when there is an overt threat indicative of imminent danger and the defendant reasonably feared death or serious bodily injury from the victim. *Caison, 52 Va. App. at 423, 663 S.E.2d at 561–62.*

In *Foster*, the Court held that the law pertaining to defense of others applies in Virginia where a defendant reasonably believes, based on the attendant circumstances, that the person defended is in danger of death or great bodily harm and was without fault in provoking the fray. *13 Va. App. at 386, 412 S.E.2d at 202.*

ALERTS:

• In order for the perceived danger to be "imminent," there must be some "overt act" on the part of the victim indicative of immediate danger at the time. *Sands, 262 Va. at 729, 553 S.E.2d at 736.*

• There is a "legal principle that when a party is assaulted in his own home, that party, as a homeowner (or tenant, as the case may be) has the right to use whatever means necessary to repel the aggressor, even to the taking of life." *Hines v. Commonwealth, 292 Va. 674, 681, 791 S.E.2d 563, 566 (2016); Fortune v. Commonwealth, 133 Va. 669, 687, 112 S.E. 861, 867 (1922)* (discussing the

"Defense of the Castle" doctrine). The Supreme Court of Virginia went on to say that the defendant in *Hines* had used "appropriate force."

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 33.1–33.7

MICHIE'S JURISPRUDENCE, Homicide §§ 39–45

Instruction No. 52.515

Defense of Property

A person is entitled to use force for the protection of [his/her] **property, but the force used must be reasonable in relation to the harm threatened.** [Force that endangers human life or does great bodily harm, or that threatens human life or great bodily harm, is an unreasonable use of force when used in defense of property.] **You must decide whether the use of force by** (name of defendant) **was reasonable under all of the particular circumstances of this case to protect** [his/her] **property.**

If you find that the defendant used reasonable force in defense of property, then you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Commonwealth v. Alexander, 260 Va. 238, 241–42, 531 S.E.2d 567, 568–69 (2000); *Diffendal v. Commonwealth, 8 Va. App. 417, 421–22, 382 S.E.2d 24, 26 (1989)*; *Montgomery v. Commonwealth, 98 Va. 840, 842–43, 36 S.E. 371, 372 (1900)*.

PRACTICE COMMENTARY: When one is privileged to use force, the amount of force used must be reasonable in relation to the harm threatened. See *Diffendal, 8 Va. App. at 421, 382 S.E.2d at 26*. The reasonableness of the force used is a factual issue. *Id. at 422, 382 S.E.2d at 26*.

Just as a defendant generally may not use deadly force in defense of property, a defendant ordinarily may not *threaten* the use of deadly force in defense of property. *Alexander, 260 Va. at 241, 531 S.E.2d at 568*. In *Montgomery*, the Court held that the threat or use of deadly force did not constitute a justified response to a trespass. *98 Va. at 842–43, 36 S.E. at 372*. In *Diffendal*, however, the Court held that the defendant was entitled to an instruction on the threat to use deadly force because he was confronted with an armed trespasser. *8 Va. App. at 422, 382 S.E.2d at 26*.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 33.1–33.7

Instruction No. 52.520

Right to Arm

A person who reasonably believes that another intends to attack him for the purpose of killing him or doing him serious bodily harm has a right to arm himself for his own necessary self-protection. In such a case, no inference of malice can be drawn from the fact that he armed himself.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Commonwealth v. Cary, 271 Va. 87, 112–14, 623 S.E.2d 906, 920–21 (2006); *Wilson v. Commonwealth, 25 Va. App. 263, 274–75, 487 S.E.2d 857, 863 (1997)*; *Boggs v. Commonwealth, 199 Va. 478, 488–89, 100 S.E. 2d 766, 774 (1957)*; *Jones v. Commonwealth, 187 Va. 133, 143–44, 45 S.E.2d 908, 912 (1948)*; *Bevley v. Commonwealth, 185 Va. 210, 215, 38 S.E.2d 331, 333 (1946)*; *Stapleton v. Commonwealth, 123 Va. 825, 830–31, 96 S.E. 801, 802 (1918)*.

PRACTICE COMMENTARY: The Supreme Court of Virginia "has consistently held that a right to arm instruction is correctly given only when the threat to the [proponent's] life is specific and nearly contemporaneous with the [proponent's] action in arming himself." *Cary, 271 Va. at 112–13, 623 S.E.2d at 920*; see also *Jones, 187 Va. at 143–44, 45 S.E.2d at 912*.

In *Bevley*, 185 Va. at 215, 38 S.E.2d at 333, the Supreme Court of Virginia held that an instruction featuring language similar to the model instruction was a correct statement of Virginia law, and in *Jones*, the Court held that the refusal of a similar instruction was erroneous where the defendant obtained a handgun from his house after the victim had beaten and threatened to kill the defendant fifteen minutes before the killing. *Jones, 187 Va. at 141–42, 45 S.E.2d at 911–12*.

ALERTS:

• This instruction can be given only when the evidence shows that the defendant "armed himself with planning and deliberation for the purpose of being able to defend himself from a future attack." *Lynn v. Commonwealth, 27 Va. App. 336, 348, 499 S.E.2d 1, 6 (1998), aff'd, 257 Va. 239, 514 S.E.2d 147 (1999)* (per curiam). It cannot be given when the evidence shows that the defendant, in fending off a sudden attack, disarmed his assailant and killed the assailant with the assailant's own weapon. *Id.* at 348, 499 S.E.2d at 7.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 33.1–33.7

MICHIE'S JURISPRUDENCE, Weapons § 2

Instruction No. 52.525

Self-Defense—Presentation of or Brandishing a Firearm (Right to Threaten Force)

If you believe from the evidence that the defendant was without fault in provoking or bringing on the incident and if you further believe that the defendant reasonably feared, under the circumstances as they appeared to him, that he was in danger of being killed or that he was in danger of great bodily harm, then his [pointing, holding, brandishing] **a firearm was in self-defense and you shall find the defendant not guilty.**

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Delacruz v. Commonwealth, 11 Va. App. 335, 338, 398 S.E.2d 103, 105 (1990)

PRACTICE COMMENTARY: Va. Code Ann §18.2-282, the Virginia brandishing statute, includes the provision that, "this section shall not apply to any person engaged in excusable or justifiable self-defense."

The court in *Delacruz* held that it was reversible error to refuse this instruction when it was appropriate to the factual issue in the case, even when the jury had received an instruction similar to Instruction No. 52.520 on the right to arm and a separate instruction requiring the jury to consider the circumstances as they reasonably appeared to the defendant. *Delacruz, 11 Va. App. at 339, 398 S.E.2d at 105–06.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Defense of Self or Others"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 33.1–33.7

MICHIE'S JURISPRUDENCE, Homicide §§ 39–45

Instruction No. 52.530

Accident

Where the defense is that the [homicide; malicious wounding; unlawful wounding; (name other intentional act to which the defense applies)] **was an accident, the defendant is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the** [homicide; malicious wounding; unlawful wounding; (name other intentional act to which the defense applies)] **was not accidental. If, after considering all the evidence, you have a reasonable doubt whether the** [homicide; malicious wounding; unlawful wounding; (name other intentional act to which the defense applies)] **was accidental or intentional, then you shall find the defendant not guilty.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

King v. Commonwealth, 64 Va. App. 580, 585–92, 770 S.E.2d 214, 217–20 (2015); *Helmick v. Commonwealth, 38 Va. App. 558, 568-69, 567 S.E.2d 551, 556–57 (2002); Martin v. Commonwealth, 218 Va. 4, 6–7, 235 S.E.2d 304, 305 (1977); Jones v. Commonwealth, 196 Va. 10, 15, 82 S.E.2d 482, 485 (1954).*

PRACTICE COMMENTARY: In *King*, a case involving a charge of malicious wounding, the Court of Appeals held that under the facts of that case, the defendant was entitled to have a modified version of this model instruction given to the jury as a "proper statement of the law," which stated:

> Where the defense is that malicious wounding was an accident, the defendant is not required to prove this fact. The burden is on the Commonwealth to prove beyond a reasonable doubt that the malicious wounding was not accidental. If after considering all the evidence you have a reasonable doubt whether the malicious wounding was accidental or intentional, then you shall find the defendant not guilty.

64 Va. App. at 585–86, 588, 592, 770 S.E.2d at 217, 218, 220.

In *Jones* the evidence raised the question of whether the killing was in self-defense or whether it was accidental. The court said that "if either inference may be reasonably drawn, accused is entitled to have both issues submitted to the jury." *196 Va. at 15, 82 S.E.2d at 485*. Thus, it may be necessary to use this instruction with Instruction Nos. 33.800 and 33.810. However, a killing in self-defense is not ordinarily of such a nature as to support a theory of accidental homicide. *Bolyard v. Commonwealth, 11 Va. App. 274, 276, 397 S.E.2d 894, 896 (1990).*

In *Martin, 218 Va. at 6–7, 235 S.E.2d at 305*, the court specifically addressed the issue of whether the trial court erred in refusing an instruction on the defense of accident:

> In none of the instructions granted by the trial court, however, was the jury told that the burden was upon the Commonwealth to prove the killing was not accidental and that the jury should acquit the defendant if it entertained a reasonable doubt whether the death was accidental or intentional. It was error to refuse an instruction embodying these propositions.

ALERTS:

• This instruction may not be appropriate where involuntary manslaughter is charged.

• An accidental killing committed in the course of an unlawful, nonfelonious act constitutes involuntary manslaughter. See, e.g., *Dowden v. Commonwealth, 260 Va. 459, 470, 536 S.E.2d 437, 443 (2000)*. In such circumstances, it is improper to give

an instruction of the defense of accident. *Waters v. Commonwealth, 39 Va. App. 72, 79–80, 569 S.E.2d 763, 766–67 (2002).* In *King*, the Court of Appeals overruled *Waters* to the extent that *Waters* was inconsistent with *King. 64 Va. App. at 585–92, 770 S.E.2d at 217–20.*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Misadventure"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 34.3

MICHIE'S JURISPRUDENCE, Homicide § 48

CHAPTER 53

DEFENSES—DIMINISHED RESPONSIBILITY

Scope Note

Instruction No. 53.100 **Presumption of Sanity—Burden of Proof**

Instruction No. 53.150 **Insanity—Definition**

Instruction No. 53.160 **Irresistible Impulse—Definition**

Instruction No. 53.170 **Mental Illness Without Insanity Defense**

Instruction No. 53.180 **Expert Witnesses**

Instruction No. 53.185 **Expert Witness—Mental Illness Without Insanity Defense**

Instruction No. 53.200 **Intoxication—Voluntary**

Instruction No. 53.300 **Intoxication—Involuntary**

SCOPE NOTE

The following instructions cover Diminished Responsibility.

Instruction No. 53.100 addresses the presumption of sanity and the burden of proof.

Instruction No. 53.150 defines insanity.

Instruction No. 53.160 defines irresistible impulse.

Instruction No. 53.170 deals with mental illness, short of insanity, as a possible means of rebutting intent.

Instruction No. 53.180 outlines the weight to be given to expert witnesses.

Instruction No. 53.185 addresses the weight to be given to expert witnesses when evidence of mental illness short of insanity is admitted to rebut intent.

Instruction No. 53.200 deals with voluntary intoxication as a defense.

Instruction No. 53.300 deals with involuntary intoxication as a defense.

Instruction No. 53.100

Presumption of Sanity—Burden of Proof

The defendant is presumed to have been sane at the time of the commission of the crime. In order to be found not guilty on the ground of insanity, the defendant must prove by the greater weight of the evidence that he was insane when the crime was committed.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

White v. Commonwealth, 272 Va. 619, 625, 636 S.E.2d 353, 356 (2006); *Vann v. Commonwealth, 35 Va. App. 304, 312, 544 S.E.2d 879, 882 (2001)*; *Herbin v. Commonwealth, 28 Va. App. 173, 181, 503 S.E.2d 226, 230 (1998)*; *Boblett v. Commonwealth, 10 Va. App. 640, 651, 396 S.E.2d 131, 137 (1990)*; *Gibson v. Commonwealth, 216 Va. 412, 417–18, 219 S.E.2d 845, 849 (1975)*; *Taylor v. Commonwealth, 208 Va. 316, 322, 157 S.E.2d 185, 189–90 (1967)*; *Rollins v. Commonwealth, 207 Va. 575, 581–82, 151 S.E.2d 622, 626 (1966)*; *Christian v. Commonwealth, 202 Va. 311, 316, 117 S.E.2d 72, 75 (1960)*; *Holober v. Commonwealth, 191 Va. 826, 836, 62 S.E.2d 816, 821 (1951)*; *Maxwell v. Commonwealth, 165 Va. 860, 865, 183 S.E. 452, 454 (1936)*; *Setliff v. Commonwealth, 162 Va. 805, 815, 173 S.E. 517, 520 (1934)*; *Honesty v. Commonwealth, 81 Va. 283, 300 (1886)*; *Dejarnette v. Commonwealth, 75 Va. 867, 881 (1881)*; *Baccigalupo v. Commonwealth, 74 Va. (33 Gratt.) 807, 817–18 (1880)*; *Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860, 874–75 (1871).*

PRACTICE COMMENTARY: In *Honesty*, the Supreme Court of Virginia held that every person is presumed to be sane until proven otherwise. The Court added that insanity must be proved substantially as an independent fact, and not merely by such proof as may raise a rational doubt of sanity. *81 Va. at 300.* Similarly, the Court has stated that if the evidence is of such character as to merely produce doubt in the minds of the jury, it is not sufficient to establish a defense of insanity. *Holober, 191 Va. at 836, 62 S.E.2d at 821.*

In order to assert an insanity defense, the defendant must establish that he was insane *at the time the offense was committed.* More than a scintilla of evidence is required in order to give an insanity instruction. *Gibson, 216 Va. at 417, 219 S.E.2d at 849.*

The burden of proving insanity lies with the person alleging it. *Gibson, 216 Va. at 417, 219 S.E.2d at 849.* Insanity, when relied upon as a defense, must be proved to the satisfaction of the jury. *Wessells v. Commonwealth, 164 Va. 664, 673–75, 180 S.E.2d 419, 422–23 (1935).* It is not sufficient for the accused to merely raise a reasonable doubt as to his sanity. *Taylor, 208 Va. at 322, 157 S.E.2d at 190*; *Christian, 202 Va. at 316, 117 S.E.2d at 75.* Similarly in *Baccigalupo*, the Court held that it is not sufficient for an insanity defense that the evidence merely produce doubts about the defendant's sanity; the burden of proof is always on the accused to prove his insanity to the jury's satisfaction. *Baccigalupo, 74 Va. at 817*; see also *Dejarnette, 75 Va. at 881.*

Later cases continue to hold that every person is presumed to be sane and that the burden of proving insanity is on the person alleging it. See *White, 272 Va. at 625, 636 S.E.2d at 356*; *Vann, 35 Va. App. at 312, 544 S.E.2d at 882.*

In *Maxwell,* the court qualified the general presumption of sanity by holding that it is the presumption of the law that every person of the "age of discretion" is of sound mind. *Maxwell, 165 Va. at 865, 183 S.E.2d at 454.*

ALERTS:

• When the jury is instructed on the defense of insanity at the time of the offense, the related verdict form must provide the jury with three options: Guilty; Not Guilty; and Not Guilty By Reason of Insanity.

• Va. Code Ann. § 19.2-271.6(B), effective July 1, 2021, allows the admission of evidence of mental illness short of insanity to rebut the Commonwealth's proof of intent. Evidence of mental illness, developmental disability, intellectual disability, and autism spectrum disorder is potentially admissible, if relevant to the defendant's intent and otherwise admissible. The interplay between insanity as a defense and evidence of mental illness as a means to negate intent is uncertain. The statute specifically provides that "[n]othing in this section shall be construed to affect the requirements for a defense of insanity pursuant to Chapter 11 (§ 19.2-167, *et seq.*)" Va. Code Ann. § 19.2-271.6(F).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

Instruction No. 53.150

Insanity—Definition

If you find from the greater weight of the evidence that at the time of the crime the defendant was insane, then you must find him not guilty by reason of insanity even though you find that he committed the crime.

The defendant was insane if, because of a mental disease or defect, he did not understand the nature, character, and consequences of his act or he was unable to distinguish right from wrong.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-182.2.

PRINCIPAL CASE AUTHORITY:

Price v. Commonwealth, 228 Va. 452, 459–60, 323 S.E.2d 106, 110 (1984).

OTHER RELEVANT DECISIONS:

Schmuhl v. Commonwealth, 69 Va. App. 281, 299-304, 818 S.E.2d 71, 79–82 (2018), aff'd, 298 Va. 131, 833 S.E.2d 885 (2019); Orndorff v. Commonwealth, 279 Va. 597, 601 n.5, 691 S.E.2d 177, 179 n.5 (2010); Morgan v. Commonwealth, 50 Va. App. 120, 128, 646 S.E.2d 899, 903 (2007); White v. Commonwealth, 272 Va. 619, 625, 636 S.E.2d 353, 356 (2006); Bennett v. Commonwealth, 29 Va. App. 261, 277, 511 S.E.2d 439, 447 (1999); Herbin v. Commonwealth, 28 Va. App. 173, 181–82, 503 S.E.2d 226, 230 (1998); Breard v. Commonwealth, 248 Va. 68, 84, 445 S.E.2d 670, 689 (1994).

PRACTICE COMMENTARY: The *M'Naghten* rule, stated in the disjunctive, is the traditional test for insanity in Virginia. Under the Virginia *M'Naghten* rule, a defendant is insane if because of mental disease or defect, he did not understand the nature, character, and consequences of his act or he was unable to distinguish right from wrong at the time of the committing of the act. *Price, 228 Va. at 459–60, 323 S.E.2d at 110.*

Virginia recognizes the doctrine of "settled insanity." Normally, proof of voluntary intoxication is not a defense to a criminal charge except in cases of first degree or capital murder. However, where long-term, chronic, and habitual abuse of alcohol or drugs causes a mental defect or disease of the mind resulting in insanity, a defendant may assert an insanity defense under the doctrine of settled insanity. A settled insanity defense may be asserted under either the *M'Naghten* rule or irresistible impulse. *Morgan, 50 Va. App. at 129, 646 S.E.2d at 903*; *White, 272 Va. at 626, 636 S.E.2d at 357.*

In *Stamper v. Commonwealth*, the court stated:

> For the purposes of determining criminal responsibility a perpetrator is either legally insane or sane; there is no sliding scale of insanity. The shifting and subtle gradations of mental illness known to psychiatry are useful only in determining whether the borderline of insanity has been crossed. Unless an accused contends that he was beyond that borderline when he acted, his mental state is immaterial to the issue of specific intent.

228 Va. 707, 717, 324 S.E.2d 682, 688 (1985).

In *Schmuhl, 69 Va. App. at 300, 818 S.E.2d at 81*, the Court of Appeals noted that, in *Stamper*, the Supreme Court made clear that the only way to negate *mens rea* with evidence of a defendant's mental state is to plead an insanity defense, and there is no recognized exception for a defense premised on a defendant's involuntary intoxication. Thus, the Court of Appeals has repeatedly held that

evidence of a defendant's mental state is "immaterial" and "irrelevant" to the issue of *mens rea* where the defendant failed to put forth an insanity defense. *Id.*

Involuntary intoxication is recognized in the Commonwealth as an alternative basis for an insanity defense, proven not by showing that the defendant had a pre-existing mental disease or defect, but by showing that his involuntary intoxication produced a defect in his *mens rea* that rose to the level of insanity, as set by the *M'Naghten* rule. *Id. at 302, 818 S.E.2d at 81.* Virginia Model Jury Instruction 53.300 reflects the requirement under Virginia law that a defendant making an involuntary-intoxication defense must prove that he was insane as a result of the involuntary intoxication. *Id.*

Expert testimony concerning defendant's state of mind was not admissible in trial . . . where defendant did not present insanity defense. *Johnson v. Commonwealth, 70 Va. App. 45, 51, 824 S.E.2d 14, 17 (2019).*

☞ ***PRACTICE POINTER:***

Irresistible impulse is defined in Instruction No. 53.160.

ALERTS:

• Federal and Virginia insanity tests are *not* the same. The Federal Courts follow 18 U.S.C. § 17.

• The Supreme Court of Virginia has ruled that the insanity defense is not available in juvenile proceedings. *Commonwealth v. Chatman, 260 Va. 562, 538 S.E.2d 304 (2002).* See *D.L.G. v. Commonwealth, 60 Va. App. 77, 724 S.E.2d 208 (2012)* (where juvenile defendant did not "elect" under Va. Code Ann. § 16.1-270 to be tried as an adult on his felony charge, but was adjudicated in juvenile court, and appealed the adjudication to the circuit court, he was not entitled to rely on a plea of not guilty by reason of insanity). But see Va. Code Ann. § 16.1-274.2.

• When the jury is instructed on the defense of insanity at the time of the offense, the related verdict form must provide the jury with three options: Guilty; Not Guilty; and Not Guilty By Reason of Insanity.

• Va. Code Ann. § 19.2-271.6(B), effective July 1, 2021, which allows the admission of evidence of mental illness short of insanity to rebut the Commonwealth's proof of intent, specifically provides that "[n]othing in this section shall be construed to affect the requirements for a defense of insanity pursuant to Chapter 11 (§ 19.2-167, *et seq.*)" Va. Code Ann. § 19.2-271.6(F).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons, §§ 43–50, 51, 53–59

Involuntary intoxication is recognized in the Commonwealth as an alternative basis for an insanity defense, proven not by showing that the defendant had a pre-existing mental disease or defect, but by showing that his involuntary [illegible]

Instruction 53.300 reflects the requirement under Virginia law that a defendant [illegible] an involuntary-intoxication defense must prove that he was insane as a [illegible]

[illegible] *Commonwealth*, 70 Va. Ann. 35, 51, R.4 S.E.2d 14, 17 (2019).

PRACTICE POINTER:

Irresistible impulse is defined in Instruction No. 53.100.

CAUTION:

[illegible] 18 U.S.C. § 17.

• The Supreme Court of Virginia has ruled that the insanity defense is not available in juvenile proceedings. *Commonwealth v. Chatman*, 280 Va. [illegible] and appealed the adjudication to the circuit court, he was not entitled to rely on a plea of not guilty by reason of insanity). But see Va. Code Ann. § 16.1-274.2.

• When the jury is instructed on the defense of insanity at the time of the offense, the related, verdict form must provide the jury with three options: Guilty, Not Guilty; and Not Guilty By Reason of Insanity.

• Va. Code Ann. § 19.2-271.6(B), effective July 1, 2021, which allows the admission of evidence of mental illness short of insanity to rebut the Common- [illegible]

RESEARCH REFERENCES:

[illegible] terce" and "intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE § 31.1, 31.3, [illegible]

Instruction No. 53.160

Irresistible Impulse—Definition

If you find from the evidence that the defendant knew the nature, character and consequences of his act and knew that his act was wrong, you may still find him not guilty by reason of insanity if you find from the greater weight of the evidence that his mind was so impaired by disease that he was totally deprived of the mental ability to control or restrain his impulse to commit the criminal act.

Sources & Authority

Governing Statute:

None.

Case Authority:

Orndorff v. Commonwealth, 279 Va. 597, 601 n.5, 691 S.E.2d 177, 179 n.5 (2010); Vann v. Commonwealth 35 Va. App. 304, 312, 544 S.E.2d 879, 882 (2001); Bennett v. Commonwealth, 29 Va. App. 261, 277, 511 S.E.2d 439, 447 (1999); Herbin v. Commonwealth, 28 Va. App. 173, 181–82, 503 S.E.2d 226, 230 (1998); Breard v. Commonwealth, 248 Va. 68, 84, 445 S.E.2d 670, 689 (1994); Christian v. Commonwealth, 202 Va. 311, 316, 117 S.E.2d 72, 75 (1960); McLane v. Commonwealth, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960); Thompson v. Commonwealth, 193 Va. 704, 716–18, 70 S.E.2d 284, 291–92 (1952); Thurman v. Commonwealth, 107 Va. 912, 916–17; 60 S.E. 99, 100–01 (1908); Dejarnette v. Commonwealth, 75 Va. 867, 881 (1881).

Practice Commentary: It is not sufficient for a defendant to raise a reasonable doubt as to his sanity, he must prove by a preponderance of the evidence he was insane at the time of the commission of the act. *Christian, 202 Va. at 316, 117 S.E.2d at 77*; *McCulloch v. Commonwealth, 29 Va. App. 769, 775, 775, 514 S.E.2d 797, 800 (1999).*

Partial insanity is not sufficient to establish irresistible impulse, even when it arises from a diseased mind, if the defendant still possesses sufficient will to restrain the impulse. *Dejarnette, 75 Va. at 877–78.* Irresistible impulse is distinguished from passion or overwhelming emotion not growing out of a diseased mind. Frenzy arising solely from the passion of anger and jealousy is not irresistible impulse. *Thompson, 193 Va. at 717, 70 S.E.2d at 292.*

The irresistible impulse doctrine is only applicable where the defendant knows that the act is wrong, but is driven by an irresistible impulse to commit it. *Thompson, 193 Va. at 718, 70 S.E.2d at 292.*

If the act was planned in advance, it cannot be irresistible impulse. "Impulse" implies that which is sudden, spontaneous, or unpremeditated. *Rollins, 207 Va. at 580, 151 S.E.2d at 625*; but see *Kitze v. Commonwealth, 15 Va. App. 254, 262, 422 S.E.2d 601, 606 (1992)* (suggesting that irresistible impulse may be possible in some cases of advance planning where there is evidence of a subsequent attempt to abandon the plan).

Virginia recognizes the doctrine of "settled insanity." Normally, proof of voluntary intoxication is not a defense to a criminal charge except in cases of first degree murder or capital murder. However, where long-term, chronic, and habitual abuse of alcohol or drugs causes a mental defect or disease of the mind resulting in insanity, a defendant may assert an insanity defense under the doctrine of settled insanity. A settled insanity defense may be asserted under the *M'Naghten* rule or irresistible impulse. *Morgan v. Commonwealth, 50 Va. App. 120, 128, 646 S.E.2d*

899, 903 (2007); White v. Commonwealth, 272 Va. 619, 626, 636 S.E.2d 353, 357 (2006).

☞ ***PRACTICE POINTER:***

For a definition of insanity, see Instruction No. 53.150.

ALERTS:

• When the jury is instructed on the defense of insanity at the time of the offense, the related verdict form must provide the jury with three options: Guilty; Not Guilty; and Not Guilty By Reason of Insanity.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

899, 903 (2007); White v. Commonwealth, 272 Va. 619, 626, 635 S.E.2d 353, 357 (2006).

PRACTICE POINTER:

For a definition of insanity, see Instruction No. 53.150.

ALERTS:

[illegible] on the defense of [illegible] the [illegible] Guilty; Not Guilty; and Not Guilty By Reason of Insanity.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "[illegible] tence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

Instruction No. 53.170

Mental Illness Without Insanity Defense

You have heard evidence of the defendant's [mental illness; intellectual disability; developmental disability; autism spectrum disorder]. You are to consider that evidence only in determining whether the defendant had the intent required at the time the alleged crime was committed. If, after considering all the evidence, you have reasonable doubt the defendant possessed the intent required for the crime charged, you shall find the defendant not guilty.

Sources & Authority

Governing Statute:

Va. Code Ann. § 19.2-271.6(B).

Case Authority:

None.

Practice Commentary: Va. Code Ann. § 19.2-271.6(A) defines "mental illness," but relies upon the definitions of "developmental disability" and "intellectual disability" found in Va. Code Ann. § 37.2-100.

ALERTS:

- Va. Code Ann. § 19.2-271.6 is effective July 1, 2021.

RESEARCH REFERENCES:

None.

Instruction No. 53.180

Expert Witnesses

It is your responsibility to decide whether the defendant was insane at the time the crime was committed. You are not required to accept the opinion of any expert witness as to whether the defendant was sane or insane. You should give the testimony such consideration as you feel it is entitled along with the other evidence in the case.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Herbin v. Commonwealth, 28 Va. App. 173, 183–83, 503 S.E.2d 226, 231 (1998); Boblett v. Commonwealth, 10 Va. App. 640, 651–52, 396 S.E.2d 131, 137 (1990); Rollins v. Commonwealth, 207 Va. 575, 581–82, 151 S.E.2d 622, 626 (1966); Jones v. Commonwealth, 202 Va. 236, 239–40, 117 S.E.2d 67, 70–71 (1960); Christian v. Commonwealth, 202 Va. 311, 316, 117 S.E.2d 72, 75 (1960); McLane v. Commonwealth, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960); Holober v. Commonwealth, 191 Va. 826, 836, 62 S.E.2d 816, 821 (1951); Brenan v. Commonwealth, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945); Delp v. Commonwealth, 172 Va. 564, 571, 200 S.E. 594, 597 (1939); Maxwell v. Commonwealth, 165 Va. 860, 865, 183 S.E. 452, 454 (1936); Dejarnette v. Commonwealth, 75 Va. 867, 881 (1881).

PRACTICE COMMENTARY: The Supreme Court of Virginia's decision in *Dejarnette* established the rule that the jury is to decide the question of the defendant's sanity:

> [I]t was for the jury to say whether the prisoner was *forced* to do the killing by such a controlling disease against his will, or whether he did it voluntarily, with intention to destroy the life of the deceased.

75 Va. at 878 (emphasis in original).

The Supreme Court of Virginia has held that the jury is not required to accept as conclusive the opinion of an expert witness. In *McLane* the Supreme Court of Virginia held that jurors need not accept a doctor's testimony as conclusive merely because he qualified as a medical expert. The evidence of an expert witness should be given the same consideration as is given that of any other witness, weighing his knowledge of the person, his medical expertise, and his conduct, appearance and demeanor on the witness stand. *McLane, 202 Va. at 205–06, 116 S.E.2d at 281.*

ALERTS:

None.

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

Instruction No. 53.185

Expert Witness—Mental Illness Without Insanity Defense

It is your responsibility to decide whether the defendant possessed the required intent at the time the alleged crime was committed. You are not required to accept the opinion of any expert witness in determining whether the defendant possessed such intent. You should give the testimony of an expert such consideration as you feel it is entitled along with the other evidence in this case.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 19.2-271.6.

CASE AUTHORITY:

None.

PRACTICE COMMENTARY: The statute reads, in pertinent part, "[i]n any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, ..." The statute does not, by its terms, limit such evidence to expert witness testimony.

ALERTS:

- Va. Code Ann. § 19.2-271.6 is effective July 1, 2021.

RESEARCH REFERENCES:

Instruction No. 53.200

Intoxication—Voluntary

Voluntary intoxication is not a defense to (name of crime). **Even if you find that the defendant was greatly intoxicated by the voluntary use of** [alcohol; drugs; other substances], **you must still find him guilty if you find that the Commonwealth has proved every element of the crime beyond a reasonable doubt.**

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Abraham v. Commonwealth, 32 Va. App. 22, 28–29, 526 S.E.2d 277, 280 (2000); Swisher v. Commonwealth, 256 Va. 471, 488, 506 S.E.2d 763, 772 (1998); Herbin v. Commonwealth, 28 Va. App. 173, 183–83, 503 S.E.2d 226, 231 (1998); Boblett v. Commonwealth, 10 Va. App. 640, 651–52, 396 S.E.2d 131, 137 (1990); Wright v. Commonwealth, 234 Va. 627, 629, 363 S.E.2d 711, 712 (1988); Chittum v. Commonwealth, 211 Va. 12, 18, 174 S.E.2d 779, 783 (1970); Arey v. Peyton, 209 Va. 370, 375, 164 S.E.2d 691, 695 (1968); Wood v. Commonwealth, 163 Va. 1118, 177 S.E. 911 (1935); Gills v. Commonwealth, 141 Va. 445, 450, 126 S.E. 51, 53 (1925); Johnson v. Commonwealth, 135 Va. 524, 529, 115 S.E. 673, 675 (1923); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860, 869–71 (1871).

PRACTICE COMMENTARY: Voluntary intoxication (sometimes referred to as "drunkenness") never excuses a crime. Under *Wright* and other authority, it is a defense only in aggravated and first degree murder cases when it may negate the existence of premeditation and deliberation. In *Gills* the Court stated:

> Voluntary drunkenness, where it has not produced permanent insanity, is never an excuse for crime; except, where a party is charged with murder, if it appear that the accused was too drunk to be capable of deliberating and premeditating, then he can be convicted only of murder in the second degree.

141 Va. at 450, 126 S.E. at 53.

Voluntary intoxication evidence is irrelevant to elements of first degree murder in lying in wait. *Tisdale v. Commonwealth, 65 Va. App. 478, 778 S.E.2d 554 (2015).* See Instruction No. 33.950.

Numerous variations of this rule have been applied. *Johnson* (unlawful and malicious shooting with intent to maim and kill); *Gills* (murder); *Wood* (larceny and receipt of stolen calf); *Arey* (robbery); *Chittum* (kidnapping at gunpoint and attempted rape); *McNeil* (attempted robbery); *Wright* (murder).

The fact that the defendant is a habitual drinker with a history of continual drunkenness has no effect on the rule that voluntary drunkenness is no excuse for crime. See *Boswell* (defendant drank one week prior to and on the day of the murder); *Arey* (defendant chronic alcoholic with psychiatric reports verifying the condition).

"Settled Insanity" Defense:

Virginia recognizes the doctrine of "settled insanity." Normally, proof of voluntary intoxication is not a defense to a criminal charge except in cases of first degree murder or capital murder. However, where long-term, chronic, and habitual abuse of alcohol or drugs causes a mental defect or disease of the mind resulting in insanity, a defendant may assert an insanity defense under the doctrine of settled

insanity. A settled insanity defense may be asserted under the *M'Naghten* rule or irresistible impulse. *Morgan v. Commonwealth, 50 Va. App. 120, 128, 646 S.E.2d 899, 903 (2007)*; *White v. Commonwealth, 272 Va. 619, 626, 636 S.E.2d 353, 357 (2006).*

ALERTS:

• This instruction does not apply to first degree murder where proof of voluntary intoxication may negate deliberation and premeditation. See Instruction No. 33.950. *Essex v. Commonwealth, 228 Va. 273, 281-82, 322 S.E.2d 216, 219-20 (1984).*

• Va. Code Ann. § 19.2-271.6(B), effective July 1, 2021, allows the admission of mental illness short of insanity to rebut the Commonwealth's proof of intent. Subsection G of that statute provides: "Nothing in this section shall be construed as permitting the introduction of evidence of voluntary intoxication." Va. Code Ann. § 19.2-271.6(G).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

insanity. A settled insanity defense may be asserted under the M'Naghten rule or irresistible impulse. *Morgan v. Commonwealth*, 50 Va. App. 120, 123, 646 S.E.2d 899, 903 (2007); *White v. Commonwealth*, 272 Va. 619, 626, 636 S.E.2d 353, 357 (2006).

AXIOMS:

- This instruction does not apply to first degree murder where proof of voluntary [illegible]

- [illegible] Ann. § 19.2-271.6(C).

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, Insanity and Incompetence and Intoxication

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3 [illegible]

[illegible]

Instruction No. 53.300

Intoxication—Involuntary

Intoxication is involuntary when it is produced in a person without his willing and knowing use of [intoxicating liquor; drugs; (other substance)].

If you believe that the defendant:

(1) **Was unwillingly and unknowingly made intoxicated by** [the fraudulent contrivance of others; an accident or mistake; an error of his physician]; **and**

(2) **The intoxication so unsettled the defendant's reason that he did not understand the nature, character and consequences of his act or he was unable to distinguish right from wrong; then**

you shall find the defendant not guilty.

SOURCES & AUTHORITY

GOVERNING STATUTE:

None.

CASE AUTHORITY:

Schmuhl v. Commonwealth, 69 Va. App. 281, 299–304, 818 S.E.2d 71, 79–82 (2018), aff'd, 298 Va. 131, 833 S.E.2d 885 (2019); Johnson v. Commonwealth, 135 Va. 524, 533–36, 115 S.E. 673, 676–77 (1923); Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860, 869–71 (1871).

PRACTICE COMMENTARY: Generally, involuntary intoxication is that which has been induced by the force, duress, fraud, or contrivance of another. As stated in *Johnson*, a defendant may be relieved of criminal responsibility if involuntary intoxication "unsettles the reason" so as to render the defendant temporarily legally insane.

Insanity is defined in Instruction No. 53.150. The incorporation of the insanity definition in element (2) of the instruction is predicated on *Stamper v. Commonwealth, 228 Va. 707, 717, 324 S.E.2d 682, 688 (1985)*:

> For the purposes of determining criminal responsibility a perpetrator is either legally insane or sane; there is no sliding scale of insanity. The shifting and subtle gradations of mental illness known to psychiatry are useful only in determining whether the borderline of insanity has been crossed. Unless an accused contends that he was beyond that borderline when he acted, his mental state is immaterial to the issue of specific intent.

Involuntary intoxication is recognized in the Commonwealth as an alternative basis for an insanity defense, proven not by showing that the defendant had a pre-existing mental disease or defect, but by showing that his involuntary intoxication produced a defect in his *mens rea* that rose to the level of insanity, as set by the *M'Naghten* rule. *Id. at 302, 818 S.E.2d at 81.* Virginia Model Jury Instruction 53.300 reflects the requirement under Virginia law that a defendant making an involuntary-intoxication defense must prove that he was insane as a result of the involuntary intoxication. *Id.*

ALERTS:

• For cases dealing with the status of being a drug addict or an alcoholic, see the decisions in *Powell v. Texas, 392 U.S. 514 (1968)* and *Robinson v. California, 370 U.S. 660 (1962).*

RESEARCH REFERENCES:

Ronald J. Bacigal, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA, "Insanity and Incompetence" and "Intoxication"

John L. Costello & Craig S. Lerner, VIRGINIA CRIMINAL LAW AND PROCEDURE §§ 31.1, 31.3, 31.4, 31.5, 31.6

MICHIE'S JURISPRUDENCE, Drunkenness §§ 1–3, 11, 12; and Insane and Other Incompetent Persons §§ 43–50, 51, 53–59

CHAPTER 54

PUNISHMENT

Scope Note

Instruction No. 54.100 Class 1 Felony

Instruction No. 54.200 Class 2 Felony

Instruction No. 54.300 Class 3 Felony

Instruction No. 54.400 Class 4 Felony

Instruction No. 54.500 Class 5 Felony

Instruction No. 54.600 Class 6 Felony

Instruction No. 54.700 Class 1 Misdemeanor

SCOPE NOTE

ALERT

Significant statutory revisions pertaining to sentencing become effective July 1, 2021. Thereafter, an accused must request "ascertainment of punishment by jury", by written pleading filed at least 30 days prior to trial. Va. Code Ann. § 19.2-295(A). Otherwise, an accused found guilty by the jury will be sentenced by the court.

Murder Cases. "If a person indicted for murder be found by the jury guilty of any punishable homicide, [the jury] shall in their verdict fix the degree thereof." Va. Code Ann. § 19.2-288. Unless the accused has requested that the jury ascertain his punishment as provided in Va. Code Ann. § 19.2-295(A), "[t]he court shall ascertain the extent of the punishment to be inflicted within the bounds prescribed by [Va. Code Ann.] §§ 18.2-30 to 18.2-36[.]" *Id.*

Ascertainment of Punishment—Generally. "If the jury finds the defendant guilty of an offense . . . and the accused has requested that the jury ascertain punishment of the offense . . . [the jury] shall fix the punishment as provided in Va. Code Ann. § 19.2-295.1." Va. Code Ann. § 19.2-264.3(B). Otherwise, "[w]ithin the limits prescribed by law, the court shall ascertain the term of confinement in the state correctional facility or in jail and the amount of the fine, if any, when a person is convicted of a criminal offense." Va. Code Ann. § 19.2-295(A).

Jury Deliberations. "When the accused is tried by a jury, deliberations . . . shall be confined to a determination of the guilt or innocence of the accused, except that when the ascertainment of punishment by the jury has been requested by the accused, a proceeding in accordance with [Va. Code Ann.] § 19.2-295.1 shall apply." Va. Code Ann. § 19.2-295.

Miscellaneous. Va. Code Ann. § 19.2-295.1, "[s]entencing proceeding by the jury after conviction," and Va. Code Ann. § 19.2-295.3, "[a]dmission of victim impact testimony," have also been materially altered by these sentencing reform amendments.

These instructions on punishment are designed to be used in bifurcated felony trials where the defendant has complied with the pre-trial pleading requirements of Va. Code Ann. § 19.2-295(A) and requested to be sentenced by the jury.

Instruction Nos. 54.200 to 54.600 contain the punishments for Class 2 to 6 felonies, respectively.

Instruction No. 54.700 contains the punishment for a Class 1 misdemeanor.

A defendant is not entitled to an instruction at the penalty phase revisiting findings of guilt and innocence. *Gray v. Commonwealth, 28 Va. App. 227, 233–34, 503 S.E.2d 252, 255–56 (1998).*

A sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio* if the sentence is above the statutory range, and voidable if it is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019).* Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).* See also *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)* (explaining that a Virginia trial court "has no inherent authority to depart from the range of punishment legislatively prescribed"). Where a jury fixes the punishment for a crime at a sentence outside the statutory range and the trial court retains jurisdiction over the case, the trial court must reject such a sentence and impanel a new jury to determine a punishment within the limits set by the legislature. *Commonwealth v. Greer, 63 Va. App. 561, 579, 760 S.E.2d 132, 140–41 (2014).*

While it is undoubtedly error to sentence a defendant to a term of imprisonment shorter than that authorized by the General Assembly, such error renders the judgment merely voidable and not void *ab initio*. *Watson, 297 Va. at 361, 827 S.E.2d at 781.* In *Watson*, the Court clarified its holding in *Rawls* and *Grafmuller v. Commonwealth, 290 Va. 525, 778 S.E.2d 114 (2015),* and explained that, when (1) the General Assembly has prescribed a statutory range of sentences for an offense, and (2) a sentence is challenged at a procedurally permissible time as lying outside the range, then (3) the trial court must conduct a new sentencing hearing to permit the sentencing entity, whether judge or jury, to impose a lawful sentence. Whether the judgment is void or voidable determines the procedurally permissible time. *Id. at 360, 827 S.E.2d at 781.* Thus, any excessive sentence is void because the power to render any further judgment did not exist. However, the reverse is not true. A sentence for less than what the legislature has allowed is merely legal error, and when a court has the power to render a judgment, it has the power to render an erroneous one. *Id. at 361, 827 S.E.2d at 781.*

Graves v. Commonwealth, 294 Va. 196, 208, 805 S.E.2d 226, 232 (2017) upheld the principle set in *Rawls* but required no re-sentencing where the statute had only one specific mandated sentence with no range. Note that the Commonwealth may appeal the imposition of a sentence which is below the mandatory minimum set by the legislature. Where a new sentencing is ordered, the defendant has a constitutional and statutory right to be present at the resentencing hearing. *Grafmuller, 290 Va. at 531, 778 S.E.2d at 117.*

The action of a trial court in accepting a guilty plea and entering it in the record is not a formal adjudication of guilt. An order adjudicating guilt must be entered before judgment is rendered and the court is required to impose legislatively prescribed punishment. *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Hernandez, 281 Va. at 225, 707 S.E.2d at 275.*

In *Webb v. Commonwealth, 64 Va. App. 371, 379, 768 S.E.2d 696, 700 (2015)*, although the trial judge did not react when a juror responded negatively during the poll of the sentencing jury, and neither attorney objected to the sentence as not being unanimous, the Court of Appeals reversed the case for a new sentencing hearing pursuant to Va. Code Ann. § 19.2-295.1. The Court of Appeals ruled that a miscarriage of justice occurred when the trial court accepted a non-unanimous sentencing verdict from the jury.

In *Graham v. Florida*, the United States Supreme Court held that it is a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause to sentence a juvenile to life imprisonment without the possibility of parole for a non-homicide offense. *560 U.S. 48, 74–75 (2010).* In *Angel v. Commonwealth, 281 Va. 248, 704 S.E.2d 386 (2011)*, the Supreme Court of Virginia explained that even though Virginia eliminated parole, the court was not required by *Graham* to vacate the life sentence imposed on Angel, a juvenile at the time he committed the offense for which he was sentenced, because Va. Code Ann. § 53.1-40.01 provides for the conditional release of prisoners who have reached a certain age and served a certain length of imprisonment. In so holding, the Supreme Court of Virginia observed that in *Graham*, the United States Supreme Court noted that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do . . . is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Angel, 281 Va. at 274–75* (quoting *Graham, 560 U.S. at 75*).

The United States Supreme Court held in *Miller v. Alabama, 567 U.S. 460, 465 (2012)*, that sentencing schemes which "mandate life without parole for those under the age of 18 at the time of their crimes" violate the Eighth Amendment to the Constitution of the United States. In *Jones v. Commonwealth, 288 Va. 475, 479–81, 763 S.E.2d 823, 825–26 (2014)(Jones I)*, the Supreme Court of Virginia declined to order a new sentencing hearing for a defendant who pled guilty 12

years earlier, when he was 17 years old, to a charge of capital murder in exchange for a sentence of life without parole. Even assuming *Miller* applied retroactively, the Court concluded that, because a trial judge in Virginia retains jurisdiction under Va. Code Ann. § 19.2-303 to suspend a life sentence imposed for a Class 1 felony, such a life sentence is not mandatory, and thus does not violate *Miller*. Thereafter, the United States Supreme Court made its ruling in *Miller* retroactive. *Montgomery v. Louisiana, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).* However, on remand from the United States Supreme Court, the Supreme Court of Virginia reinstated its holding in *Jones I. Jones v. Commonwealth, 293 Va. 29, 33, 795 S.E.2d 705, 707 (2017)(Jones II).*

Aggregate term-of-years sentences imposed on juveniles, even if their total is in effect a life sentence, do not violate the Eighth Amendment. *Vasquez v. Commonwealth, 291 Va. 232, 781 S.E.2d 920 (2016).* Nor does a non-mandatory life sentence for first degree murder imposed on a juvenile. *Johnson v. Commonwealth, 292 Va. 772, 793 S.E.2d 326 (2016).*

Instruction No. 54.100

Class 1 Felony

You have found the defendant guilty of the crime of (name of Class 1 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-10(a).

CASE AUTHORITY:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

PRACTICE COMMENTARY:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

• Va. Code Ann. § 18.2-10(a), effective July 1, 2021, provides, in part: "Any person who was 18 years of age or older at the time of the offense and who is sentenced to imprisonment for life upon conviction of a Class 1 felony shall not be eligible for (i) parole, (ii) any good conduct allowance or any earned sentence credits under Chapter 6 (§ 53.1-186 et seq.) of Title 53.1, or (iii) conditional release pursuant to § 53.1-40.01 or 53.1-40.02."

Instruction No. 54.200

Class 2 Felony

You have found the defendant guilty of the crime of (name of Class 2 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000; or

(3) A specific term of imprisonment, but not less than twenty (20) years; or

(4) A specific term of imprisonment, but not less than twenty (20) years and a fine of a specific amount, but not more than $100,000.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-10(b).

Case Authority:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Practice Commentary:

None.

Alerts:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Instruction No. 54.300

Class 3 Felony

You have found the defendant guilty of the crime of (name of Class 3 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years; or

(2) A specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-10(c).

CASE AUTHORITY:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

PRACTICE COMMENTARY:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Instruction No. 54.400

Class 4 Felony

You have found the defendant guilty of the crime of (name of Class 4 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years; or

(2) A specific term of imprisonment, but not less than two (2) years nor more than ten (10) years, and a fine of a specific amount, but not more than $100,000.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-10(d).

CASE AUTHORITY:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

PRACTICE COMMENTARY:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Instruction No. 54.500

Class 5 Felony

You have found the defendant guilty of the crime of (name of Class 5 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than ten (10) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-10(e).

CASE AUTHORITY:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

PRACTICE COMMENTARY:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Instruction No. 54.600

Class 6 Felony

You have found the defendant guilty of the crime of (name of Class 6 felony).

Upon consideration of all the evidence you have heard, you shall fix his punishment at:

(1) A specific term of imprisonment, but not less than one (1) year nor more than five (5) years; or

(2) Confinement in jail for a specific time, but not more than twelve (12) months; or

(3) A fine of a specific amount, but not more than $2,500; or

(4) Confinement in jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

Sources & Authority

Governing Statute:

Va. Code Ann. § 18.2-10(f).

Case Authority:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Practice Commentary:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

Instruction No. 54.700

Class 1 Misdemeanor

You have found the defendant guilty of the crime of (name of Class 1 misdemeanor)**.**

Upon consideration of all the evidence you have heard, you shall fix the defendant's punishment at:

(1) Confinement in jail for a specific time, but not more than twelve (12) months; or

(2) A fine of a specific amount, but not more than $2,500; or

(3) Confinement in a jail for a specific time, but not more than twelve (12) months, and a fine of a specific amount, but not more than $2,500.

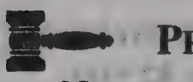
SOURCES & AUTHORITY

GOVERNING STATUTE:

Va. Code Ann. § 18.2-11(a).

CASE AUTHORITY:

Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019); *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Starrs v. Commonwealth, 287 Va. 1, 9, 752 S.E.2d 812, 817 (2014)*; *Commonwealth v. Greer, 63 Va. App. 561, 577, 760 S.E.2d 132, 140 (2014)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*; *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*



PRACTICE COMMENTARY:

None.

ALERTS:

• A sentence imposed in violation of a prescribed statutory range of punishment is void ab initio where the sentence is in excess of the statutory range, and voidable where the sentence is below the statutory range. *Commonwealth v. Watson, 297 Va. 355, 361, 827 S.E.2d 778, 781 (2019)*; *Jones v. Commonwealth, 293 Va. 29, 49, 795 S.E.2d 705, 717 (2017)*; *Hernandez v. Commonwealth, 281 Va. 222, 225, 707 S.E.2d 273, 275 (2011)*. Thus, a criminal defendant who is sentenced in violation of the statutory range is entitled to a new sentencing hearing. *Rawls v. Commonwealth, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).*

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